EMPLOYMENT TRIBUNALS

Claimant: **Ms Sheila Moorcroft**

Respondent: **SHC Clemsfold Group Limited**

Heard at: London South (by Cloud Video Platform)
On: 27, 28, 29 and 30 April 2021; 20, 21 May in Chambers.

Before: Employment Judge Street
Dr S Chacko
Ms J Saunders

Representation
Claimant: Mr Henman, friend and lay representative
Respondent: Mr Williams, solicitor

JUDGMENT

The claimant succeeds in her claim in respect of unfair constructive dismissal, wrongful dismissal, discrimination arising from disability, failure to make reasonable adjustments and harassment related to disability.

The claims of direct discrimination because of disability, indirect discrimination and victimisation are dismissed.

The Remedy hearing is listed for 12 July 2021 at 10.00 by Cloud Video Platform.

REASONS

1. **Evidence**

1.1. The Tribunal heard from the claimant and from Ms L Fehilly, Director of Human Resources ("HR"). The Tribunal was provided with a bundle of 775 pages with additional documents produced on the second day of the hearing, and read the pages referred to by the parties.

2. **Issues**

2.1. The claimant claims unfair constructive dismissal, wrongful dismissal and disability discrimination.
2.2. The issues before the Tribunal to decide are as follows. This is the list provided by Mr Henman, albeit not agreed, as adjusted by consent (as explained below) and put in broadly date order.

Jurisdictional Issues

1. Are any or all of the Claimant's claims for disability discrimination out of time?

2. If so, do the allegations made by the Claimant amount to an act extending over a period of time so as to bring the Claimant's claims in time?

3. If any of the Claimant's claims for disability discrimination are out of time, would it be just and equitable to extend the time limit for submitting such claims?

Constructive Unfair Dismissal- s.95 Employment Rights Act 1996

4. Can the Claimant establish that her resignation should be construed as a dismissal in circumstances in which she is entitled to terminate her employment without notice by reason of the employer's conduct:

a. Did the Respondent commit a breach of contract or of the implied term of trust and confidence through one or more of the following alleged matters, taken individually or cumulatively:

    i. Suspending the Claimant for more than two weeks counter to the guidance in the Respondents disciplinary policy;

    ii. Failing to conduct a full and proper investigation in a disciplinary process resulting in omitting information that should have been provided to the Claimant;

    iii. Failing to take the Claimant's grievance letter of 16/05/19 seriously;

    iv. Failing to follow the Respondent's grievance policy to investigate the Claimant's grievance;

    v. Dismissively discussing the removal of the Claimant's pin number and changing the Claimant's role and duties while registered as nurse;

    vi. Unilaterally changing the Claimant's contractual job function and salary without the Claimant's consent whilst knowing that the Claimant will still have to fulfil her legal duties of care as a registered nurse;

    vii. The Respondent's HR Department continuously breaching the Sickness and Absence policy when corresponding with the Claimant by misdescribing the purpose of the meetings and not offering to have any representation to attend or alternatively not correctly describing what representative could attend;

    viii. Threatening the Claimant in a meeting that procedures would be started to dismiss her if she did not return to work by 8/07/19;

    ix. Unilaterally relocating the Claimant without agreement or consent to a more distant and unfamiliar care home despite the concerns raised by the Clamant about how this would cause her further stress and such a move was contrary to the medical advice made by the Claimant's doctor and Occupational health.

x. By the Respondent moving the Claimant to a more distant and unfamiliar care home without consent or agreement thereby breaking the contractually established location of work maintained as a reasonable adjustment for the Claimants cancer disability;

xi. The Respondent breaching the organisations own policies and procedures in relation to matters concerning disclosure and confidentiality and therefore breaching Data Protection legislation.

b. Were the Respondent's breach or breaches of contract and/or the Respondent destroying the implied mutual trust and confidence the reasons for the Claimant's resignation; and

c. Did the Claimant lose the right to resign by affirming the contract whether by delay or otherwise?

5. If so, can the Respondent show a potentially fair reason for dismissing the Claimant? The Respondent relies on some other substantial reason, namely a breakdown in relationship.

6. If so, was the dismissal fair or unfair in accordance with section 98(4) Employment Rights Act 1996?

Wrongful Dismissal

7. Did the Claimant resign without notice for just cause?

8. If so, is the Claimant entitled to any notice pay from the Respondent?

9. If so, how much notice pay is the Claimant entitled to?

Disability

Disabled Person

10. The conditions relied upon by the Claimant are:

a. Breast cancer;
b. Anxiety; and

c. Depression.

11. The Respondent accepts that the claimant is a disabled person at all material times by reason of those conditions in accordance with Section 6 Equality Act 2010

Knowledge

12. In respect of conditions that would amount to a disability, did the Respondent make reasonably efforts to determine if the Claimant was a disabled person?

13. Did the employer respond appropriately to the Claimant with a known disability when she asked for reasonable adjustments to be made that were practical and affordable to accommodate?

14. In respect of any conditions that amount to a disability, can the Respondent show that it did not know and could not reasonably have been expected to have known that the Claimant was a disabled person?

Direct Disability Discrimination- s.13 Equality Act 2010

15. In respect of the claim for direct disability discrimination, the Claimant relies on the following acts or continuing series of Acts:

a. The manner in which the investigation meeting on 24/09/2018 was conducted;

b. The Respondent inviting the Claimant, by letter dated 04/04/2019, to a 'sickness Absence Review Meeting' on 09/04/2019;

c. The Respondent inviting the Claimant by letter dated 14/05/2019 to a further '*informal wellbeing meeting to discuss the current state of your diagnosed medical condition*' on 24/05/2019;

d. The Respondent's HR Director (Ms Jones) writing in a letter dated 23/05/2019, in direct response to the Claimant's grievance dated 16/05/2019, that matters raised would not be investigated as they were out of time and a second appeal was not permitted;

e. The Respondent asking the Claimant in a letter dated 23/05/2019 to attend a rescheduled wellness meeting on 30/05/2019;

f. The Respondent sending a letter to the Claimant dated 05/06/2019 that threatened the Claimant with a stage 3 Sickness Absence Hearing if the Claimant did not return to her work duties by Monday 08/07/2019 with a possible outcome being the termination of employment on the grounds of capability;

g. The Respondent in the same letter sent to the Claimant dated 05/06/2019 concluding the letter with '*we look forward to you returning to work on Monday 8 July 2019*' thereby continuing the implied capability threat against the Claimant irrespective of her medical condition;

h. The Respondent removing a reasonable adjustment previously made for the Claimant's disability in a meeting on 26/06/2019, by relocating the Claimant to a different and more distant care home;

i. In a meeting on 26/06/2019, the Respondent removing a reasonable adjustment previously made for the Claimant's disability in relation to her working 24 hours per week over two 12-hour night shifts;

j. The Respondent ignoring a telephone notification by the Claimant on 27/06/2019 that her doctor was concerned about her change of location and this might be detrimental to the Claimant's health;

k. The Respondent ignoring a telephone request by the Claimant on 27/06/2019 that she wanted to remain at Boldings Lodge as she had happily worked there for 10 years;

l. The Respondent on 27/06/2019 ignoring a telephone request made by the Claimant to consider an alternative move to Kingsmead Lodge as she car shares with her daughter and it is closer to home;

m. The Respondent disregarding a doctor's letter dates 01/07/2019 regarding concerns about the change of location and the same being detrimental to the Claimant's health;

n. The Respondent disregarding the recommendations and guidance from Occupational Health dated 03/07/2019 and failing to take onboard concerns about the Claimant's change of location and this might be detrimental to the Claimant's health;

o. The Respondent refusing to reconsider its position on relocating the Claimant and leaving her at Boldings Lodge as a reasonable adjustment requested by the Claimant;

p. The Respondent breaching staff confidentiality and data protection in respect to six witness statements that had been sent to the Claimant which were related to another individual's disciplinary;

q. Ms Jones acknowledging in a letter dated 24/07/2019 that one of the reasons the Claimant was being moved was because of the six witness statements (that did not relate to the Claimant);

r. Ms Jones advising in a letter dated 24/07/2019 that the Claimant was being moved location because *"In our view it would be remiss of SHC to place you back at Boldings because of this* [six witness statements] *and the difficulties that it may create for you and other staff;*

s. By the Respondent moving the Claimant to an unfamiliar care home thereby breaking the contractually established reasonable adjustments put in place in January 2018 for the Claimants disability;

t. Dismissing the Claimant.

16. Are the facts alleged at 15 a. – o. above such that the Tribunal could conclude that the alleged conduct of the Respondent amounted to less favourable treatment of the Claimant because of disability than either a hypothetical comparator or an actual comparator (nurses at Boldings Lodge / Orchard Lodge / Ms Uju)?

17. If so, can the Respondent nevertheless show that here was no contravention of Section 13 Equality Act 2010?

Discrimination arising from disability- s.15 Equality Act 2010

18. Did the Respondent treat the Claimant unfavourably in any of the following ways as alleged?

a. The manner in which the investigation meeting on 24/09/2018 was conducted;

b. The Respondent inviting the Claimant, by letter dated 04/04/2019, to a 'sickness review meeting' on 09/04/2019;

c. The Respondent inviting the Claimant by letter dated 14/05/2019 to a further '*informal wellbeing meeting to discuss the current state of your diagnosed medical condition*' on 24/05/2019;

d. The Respondent asking the Claimant in a letter dated 23/05/2019 to attend a rescheduled wellness meeting on 30/05/2019;

e. The Respondent sending a letter to the Claimant dated 05/06/2019 that threatened the Claimant with a stage 3 Sickness Absence Hearing if the Claimant did not return to her work duties by Monday 8/07/19 with a possible outcome being the termination of employment on the grounds of capability;

f. The Respondent in the same letter sent to the Claimant dated 05/06/2019 concluding the letter with '*we look forward to you returning to work on Monday 8 July 2019*' thereby continuing the implied capability threat against the Claimant;

g. The Respondent in the same letter sent to the Claimant dated 05/06/2019 concluding the letter with '*we look forward to you returning to work on Monday 8 July 2019*' thereby continuing the implied capability threat against the Claimant irrespective of her medical condition;

h. The Respondent removing a reasonable adjustment previously made for the Claimant's disability in a meeting on 26/06/2019, by relocating the Claimant to a different and more distant care home;

i. In a meeting on 26/06/2019, the Respondent removing a reasonable adjustment previously made for the Claimant's disability in relation to her working 24 hours per week over two 12-hour night shifts;

j. The Respondent ignoring a telephone notification by the Claimant on 27/06/2019 that her doctor was concerned about her change of location and this might be detrimental to the Claimant's health;

k. The Respondent ignoring a telephone request by the Claimant on 27/06/2019 that she wanted to remain at Boldings Lodge as she had happily worked there for 10 years;

l. The Respondent on 27/06/2019 ignoring a telephone request made by the Claimant to consider an alternative move to Kingsmead Lodge as she car shares with her daughter and it is closer to home;

m. The Respondent disregarding a doctor's letter dated 01/07/2019 regarding concerns about the change of location and the same being detrimental to the Claimant's health;

n. The Respondent disregarding the recommendations and guidance from occupational health dated 03/07/2019 and failing to take onboard concerns about the Claimant's change of location and this might be detrimental to the Claimant's health;

o. The Respondent breaching staff confidentiality and data protection in respect to six witness statements that had been sent to the Claimant which were related to another individual's disciplinary;

p. Ms Jones acknowledging in a letter dated 24/07/2019 that the Claimant was being moved to a new location because of 6 witness statements that did not relate to the Claimant;

q. Ms Jones advising in a letter dated 24/07/2019 that the Claimant was being moved location because *"In our view it would be remiss of SHC to place you back at Boldings because of this* [6 witness statements] *and the difficulties that it may create for you and other staff;*

r. By Ms Jones proposing in a letter received on 09/08/2019 that she would be prepared to hold a grievance and investigation in response to the Claimant's letter of 29/07/2019 but would exclude the issues raised previously;

s. By Ms Jones stating in a letter received on 09/08/2019 that she accepts the Claimants resignation thereby invalidating the grievance investigation offer made in the same letter;

u. Dismissing the Claimant.

19. If the Claimant was treated unfavourably then was the unfavourable treatment because of something arising from the Claimant's disability, namely being off work for 5 months and her unwillingness to move to a different care home.

20. If so, can the Respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

Indirect Discrimination- s.19 Equality Act 2010

21. Did the Respondent apply the following provisions, criteria and/ or practices ('PCPs'):

    a. A practice in the Respondent's stage 3 disciplinary procedure where "*the next stage may be a Disciplinary transfer*".

22. Did the Respondent apply the alleged PCPs to persons who do not share the same protected characteristic as the Claimant?

    a. Any registered nurse that is/was a worker (employed, bank or agency) that is/was located at Boldings Lodge/Orchard Lodge that were part of a disciplinary process.

23. Did the PCPs relied upon put, or would put persons with who the Claimant shares the protected characteristic, at a disadvantage when compared with persons with whom the Claimant does not share it in any of the following ways as alleged:

    a. Having difficulty in coping with change and in particular transfer from a familiar place of work.

24. Did the PCPs put the Claimant at the disadvantage complained of?

    a. The Claimant was instructed by the Respondent in a 'disciplinary transfer' to a more distant and underperforming care home with unknown management, unknown staff and more numerous residents with different nursing needs while being disabled and under continuing medical treatment for cancer, depression, anxiety, panic attacks and insomnia;

    a. The Claimant's established contractual arrangement to work at Boldings Lodge, put in place in January 2018 as reasonable adjustments due to disability, was removed with the Respondent's

non-consensual ‘disciplinary transfer’ to this more distant underperforming care home as described in 24 a.

25. Can the Respondent justify the PCPs by showing them to be a proportionate means of achieving a legitimate aim?

26. Did the Respondent apply the following provisions, criteria and/ or practices (‘PCPs’):

    a. A practice in a worker’s contract with the Respondent that states: *“You will be based at ‘*named care home*’. You may, however, be required to work at any other place from where the Organisation may operate from time to time or at any other establishment instructed by the Organisation within reasonable daily travelling distance of your home.”*

27. Did the Respondent apply the alleged PCPs to persons who do not share the same protected characteristic as the Claimant?

    a. Any worker that has a contractual arrangement to work in a registered care home within the Respondents control.

28. Did the PCPs relied upon put, or would put persons with who the Claimant shares the protected characteristic, at a disadvantage when compared with persons with whom the Claimant does not share it in any of the following ways as alleged:

    a. Having difficulty in coping with change and in particular transfer from a familiar place of work.

29. Did the PCPs put the Claimant at the disadvantage complained of?

    a. The Claimant was instructed by the Respondent to transfer to a more distant and underperforming care home with unknown management, unknown staff and more numerous residents with different nursing needs while being disabled and under continuing medical treatment for cancer, depression, anxiety, panic attacks and insomnia;

    b. The Claimant’s established contractual arrangement to work at Boldings Lodge put in place in January 2018 as reasonable adjustments due to disability was removed with a non-consensual ‘transfer’ to this more distant underperforming care home;

    c. Requiring the Claimant to travel to a more distant location facing more traffic congestion and additional long hold ups at peak hours

which exposes the Claimant to longer and more variable travel time thereby increasing stress anxiety and potential accident risk while disabled and under continuing medical treatment for cancer, depression, anxiety, panic attacks and insomnia;

d. The Respondent proposing to the Claimant that she could take the free company bus which travels between different care home locations and into the town centre increasing time of travel and reducing flexibility of when the Claimant could travel / work.

30. Can the Respondent justify the PCPs by showing them to be a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments (section 20 EA 2010)

31. Did the Respondent apply a provision, criterion or practice on the Claimant despite her disability?

    a. The Respondent's applied a stage 3 disciplinary procedure on the Claimant where "*the next stage may be a Disciplinary transfer*" by transferring her from Boldings Lodge to The Laurels;

    b. The Respondent applied the Claimant's contract term: "*You may, however, be required to work at any other place from where the Organisation may operate from time to time or at any other establishment instructed by the Organisation within reasonable daily travelling distance of your home.*" The Respondent intended to transfer the Claimant from Boldings Lodge to The Laurels.

32. Did any such provision criterion or practice put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? By reason of her disability, the claimant has difficulty in coping with change and that has effects on her health.

    a. The Claimant was instructed by the Respondent to transfer to an underperforming care home with unknown management, unknown staff and more numerous residents with different nursing needs while being disabled and under continuing medical treatment for cancer, depression, anxiety, panic attacks and insomnia;

    b. The Claimant's established contractual arrangement to work at Boldings Lodge put in place in January 2018 for reasonable adjustments due to disability was removed with a non-consensual 'transfer' to this more distant underperforming care home;

c. Requiring the Claimant to travel to a more distant location facing more traffic congestion and additional long hold ups at peak hours which exposes the Claimant to longer and more variable travel time thereby increasing stress anxiety and accident risk while disabled and under continuing medical treatment for cancer, depression, anxiety, panic attacks and insomnia;

d. The Respondent proposing to the Claimant that she could take the free company bus which travels between different care home locations and into the town centre increasing time of travel and reducing flexibility of when the Claimant could travel / work.

33. Did the Respondent have a duty to make a reasonable adjustment by allowing the Claimant to remain working at Boldings Lodge?

34. Did the Respondent make reasonable adjustments?

Harassment- s.26 Equality Act 2010

35. Did the Respondent subject the Claimant to any of the following unwanted conduct as alleged?

a. Ms Jones writing in a letter dated 23/05/2019, in direct response to the Claimant's grievance dated 16/05/2019, that matters raised would not be investigated as they were out of time and a second appeal was not permitted;

b. The Respondent's HR Department continuously breaching the Sickness and Absence policy when corresponding with the Claimant by misdescribing the purpose of the meetings and not offering to have any representation to attend or alternatively not correctly describing what representative could attend;

c. The Respondent sending a letter to the Claimant dated 5/06/19 that threatened the Claimant with a stage 3 Sickness Absence Hearing if the Claimant did not return to work on 08/07/2019 with a possible outcome being termination of employment on the grounds of capability;

d. The Respondent in the same letter sent to the Claimant dated 5/06/19 concluding the letter with '*we look forward to you*

returning to work on Monday 8 July 2019' thereby reinforcing the stated capability and dismissal threat against the Claimant.

e. In a meeting on 26/06/19, the Respondent telling the Claimant that she would be moved to a more distant and unfamiliar care home thereby breaking the established reasonable adjustments put in place in January 2018 in response to the Claimants disability;

f. In a meeting on 26/06/19, the Respondent removing a reasonable adjustment previously made for the Claimant in relation to her working at Boldings Lodge a home that she had happily worked at for 10 years;

g. The Respondent on 27/06/19 ignoring a telephone request made by the Claimant to consider staying at Boldings Lodge or as an alternative, move to Kingsmead Lodge;

h. The Respondent relocating the Claimant to a more distant and unfamiliar care home despite concerns being raised by the Claimant about how this would affect her wellbeing;

i. The Respondent continuing to relocate the Claimant to a more distant and unfamiliar care home counter to the advice given by the Claimant's Doctor that this could be detrimental to the Claimant's health;

j. The Respondent continuing to relocate the Claimant to a more distant and unfamiliar care home counter to the advice given by the Occupational Health Report that this could be detrimental to the Claimant's health;

k. Ms Jones acknowledging in a letter dated 24/07/2019 that the Claimant was being moved to a new location because of 6 witness statements that did not relate to the Claimant;

l. Ms Jones advising in a letter dated 24/07/2019 that the Claimant was being sent to a new location because *"In our view it would be remiss of SHC to place you back at Boldings because of this* [6 witness statements] *and the difficulties that it may create for you and other staff.*

m. By Ms Jones proposing in a letter received on 09/08/2019 that she would be prepared to hold a grievance and investigation in response to the Claimant's letter of 29/07/2019 but would exclude the issues raised previously;

n. By Ms Jones stating in a letter received on 09/08/2019 that she accepts the Claimants resignation thereby invalidating the grievance investigation offer made in the same letter;

o. Dismissing the Claimant.

36. If so, did that conduct relate to the Claimant's protected characteristic, namely disability?

37. If so, did the unwanted conduct have the purpose or effect of:

a. Violating the Claimant's dignity; or

b. Creating an intimidating, hostile, degrading, humiliating or offensive environment or the Claimant?

38. If so, having regard to all the circumstances of the case and the perception of the Claimant, was it reasonable for the conduct to have that effect on the Claimant?

Victimisation- s.27 Equality Act 2010

39. Did the Respondent subject the Claimant to a detriment because the Claimant had:

a. Done a protected act; or

b. Because the Respondent believed that the Claimant had done a protected act.

40. Are the below acts relied upon by the Claimant protected acts?:

a. The Claimant advising the Respondent by way of correspondence and sequential doctor's notes that she was unfit for her duties due to work related stress and they needed to consider reasonable adjustments in returning her to work;

b. The Claimant raising a grievance on 16/05/19 concerning a failure to follow policy and procedure;

c. The Claimant raising a concern that the Respondent was breaching the organisations own policies and procedures in relation to matters concerning disclosure and confidentiality and therefore breaching Data Protection legislation.

41. The detriments relied upon by the Claimant are as follows:

a. The Respondent's HR Director (Ms Jones) writing in a letter dated 23/05/19 concerning the Claimants grievance by stating that the complaints would not be investigated and that nothing would be done;

b. The Respondent's HR Department continuously breaching the Sickness and Absence policy when corresponding with the Claimant by misdescribing the purpose of the meetings and not offering to have any representation to attend or alternatively not correctly describing what representative could attend;

c. The Respondent sending a letter to the Claimant dated 5/06/19 that threatened the Claimant with a stage 3 Sickness Absence Hearing if the Claimant did not return to work with a possible outcome being termination of employment on the grounds of capability.

d. The Respondent in the same letter sent to the Claimant dated 5/06/19 concluding the letter with '*we look forward to you returning to work on Monday 8 July 2019*' thereby reinforcing the stated capability and dismissal threat against the Claimant.

e. The Respondent relocating the Claimant to an unfamiliar care home despite the health concerns raised directly by the Claimant about how this further stress her and affect her wellbeing.

f. By the Respondent continuing to relocate the Claimant to a more distant and unfamiliar care home despite her requests to stay at Boldings Lodge, thereby removing an in-place reasonable adjustment which was to work at Boldings as per her contract;

g. The Respondent continuing to relocate the Claimant to a more distant and unfamiliar care home counter to the advice given by the Claimant's Doctor that this could be detrimental to the Claimant's health;

h. The Respondent continuing to relocate the Claimant to a more distant and unfamiliar care home counter to the advice given by the Occupational Health Report that this could be detrimental to the Claimant's health;

i. The Respondent breaching staff confidentiality and data protection in respect to six witness statements that had been sent to the Claimant which were related to another individual's disciplinary;

j. The Respondent breaching data protection legislation by not disclosing requested information to the Claimant in response to a Subject Access Request;

k. Ms Jones acknowledging in a letter dated 24/07/2019 that the Claimant was being moved to a new location because of 6 witness statements that did not relate to the Claimant;

l. Ms Jones advising in a letter dated 24/07/2019 that the Claimant was being sent to a new location because *"In our view it would be remiss of SHC to place you back at Boldings because of this* [6 witness statements] *and the difficulties that it may create for you and other staff;*

m. By Ms Jones proposing in a letter received on 09/08/2019 that she would be prepared to hold a grievance investigation in response to the Claimant's letter of 29/07/2019 but the Respondent would exclude the issues raised previously in her 16/05/2019 letter;

n. By Ms Jones stating in a letter received on 09/08/2019 that she accepts the Claimants resignation thereby invalidating the grievance investigation offer made in the same letter;

o. Dismissing the Claimant.

3. **Findings of Fact**

3.1. The Respondent is a care home provider. It currently runs some 12 care homes. They operated more, perhaps 14 or 15, at the time of these events. Currently there are some 500 employees.

3.2. Ms Fehilly has been the Director of Human Resources for the Respondent since 02/02/20. Those directly involved at the time this claim is about have left the Respondent's service.

3.3. The Claimant is a registered nurse and was employed by the Respondent from 15/03/10 to 8/07/19 when she resigned without notice.

3.4. She was employed to work as a nurse at Orchard Lodge (130) but at all material times was assigned to Boldings Lodge. These are two adjacent and linked high dependency care homes. Orchard Lodge is larger with 22 beds and Boldings Lodge has 12.

3.5. Ms Moorcroft worked nights in part because she cared for her disabled long-term partner during the day.

3.6. Prior to the matters at issue here, she had a good disciplinary and competence record. When she first joined the Respondent, she was under investigation by the NMC (the nursing and midwifery regulator). The case against her was closed with no case to answer, so she has a clean record.

Disability

3.7. The claimant was diagnosed with breast cancer and signed off on long term sickness absence from work on 15/12/16.

3.8. She had had a diagnosis of depression in 1999 (GP report June 2020). She was treated for anxiety and panic attacks from 2011, when her partner was terminally ill.

3.9. Her GP completed a short report on 08/11/17, which confirmed that she would be fit to return in the new year of 2018, "by working 2 non-consecutive night shifts per week" (302).

3.10. A GP report was commissioned on 20/11/17 for the purposes of planning her return to work, asking in particular for guidance on the likely date of return to work, any ongoing disability, whether that would be permanent or temporary and whether she would be able to render regular and efficient service in future. Specific recommendations were requested, for example, no lifting or driving, that would assist in identifying suitable alternative work if necessary and whether there was any recommendation for continued medication or treatment. It did not name any specific condition.

3.11. That report has not been produced. A prepayment invoice was submitted to the Respondent but not paid and the report was not received.

3.12. At the time, Mrs Moorcroft's medication included medication for anxiety and depression, paroxetine and sondate XL with nitrazepam for insomnia and panic attacks, as well as letrozole intended to protect against cancer recurring.

3.13. The medication in respect of depression had been in place since 1999 and in respect of helping with sleep, anxiety and panic attacks since 2012 (Impact statement 758)*.*

3.14. She was still awaiting reconstructive surgery in respect of the breast cancer.

3.15. Having given consent for the report to be obtained, Ms Moorcroft understood the respondent to have been informed of her medical history, including her mental health problems of long-standing. However, she agrees that, without that report, the Respondent would not have known of her stress-related problems (save as characteristic for those with a cancer diagnosis) before she was signed off with work-related stress (oral evidence). She agrees she did not make an issue of her mental health problems, but,

> "Even if they did not understand my stress levels, they were supposed to be supporting my recovery and helping me get over my breast cancer.

3.16. She met the Occupational Health practitioner, Wendy Ladd on 28/02/18 (331) There was a recommendation for a staged return to work over four weeks, to permit her to work in a supernumerary role, gradually increasing her activity. Her status as a disabled person was recorded. She is reported as feeling well and keen to return to work.

3.17. There is no reference to her history of mental health problems and her psychological well being is only canvassed in general terms,

> "Work is generally good for health and wellbeing….. When people have been off sick long-term though, their level of physical and mental stamina is unlikely to be as it was prior to their absence, but they can only build up that stamina by gradually returning to work". (332)

Contract and adjustment

3.18. For her return to work, Ms Moorcroft negotiated a reduction in her working hours from three night shifts (36 hours) to two (24 hours), at Boldings, which the Respondent accepted as a reasonable adjustment in the light of her disability. She also had a phased return to work (SM para 11 and 14).

3.19. The adjustments reflected her need for reduced working hours from 36 per week to avoid undue fatigue, her need for a familiar and very local place of work, to help her with depression, anxiety, panic attacks and insomnia. She found coping with change difficult. She remained under treatment for her mental health conditions and needed an environment and conditions in which she could manage them successfully. She also had responsibility as a carer for her new partner, who was disabled with chronic obstructive pulmonary disease. The Respondent has not recorded the reasons for the adjustment and we don't know how fully they were discussed, but those were the reasons she sought them.

3.20. Those changes are reflected in the contract effective from 5/03/18 (159 – 172).

3.21. She returned to active duties on 8/03/18, having taken the accrued holiday arising during her absence.

3.22. Her rate of pay in the 2018 contract was £13.00 per hour normally but £13.50 per hour at the weekend and £26 per hour over Bank Holidays.

3.23. A further contract was entered into with effect from 10/01/19. The rate of pay was £15.00 per hour normally but £15.50 at the weekend.

August 2018 – first disciplinary

3.24. In August 2018, an individual supported by the respondent was admitted to hospital and subsequently diagnosed with pneumonia.

3.25. Ms Moorcroft had been involved in his care on the night of 2/08/18 to 3/08/18.

3.26. She was initially suspended pending an investigation. She was instructed in a telephone message on 9/08/19 not to come to work. She did not know at that stage why, was not told in response to her enquiry and was distressed (phone call, letter 10/08/18, SM para 12).

3.27. The Disciplinary Policy permits suspension in the event of serious or gross misconduct. The suspension is on full basic pay. It is described as a neutral act, and to be for as short a period as possible. It is not considered a disciplinary action (214).

3.28. On 10/08/18, she received a letter from Ms Bryce, the then Head of HR, referring to the suspension and to a conversation about it said to have been on 9/08/18, which had not taken place,

> "I made you aware of the serious allegations which have been made against you in relation to failure to appropriately respond to deteriorating condition of a person in your care" (344 and SM ws para 18).

3.29. Ms Moorcroft was invited to an investigation meeting on 24/08/18 by a letter dated 21/08/18. (346) That was the first contact after 10/08/18. She had been ill while waiting (SM para 21).

3.30. The letter sets out the basis of the investigation,

"The misconduct alleged includes: -

- Failure to respond to reading below baseline observations
- Failure to safeguard a person we support"

3.31. She was not offered the opportunity to be accompanied.

3.32. She was not told which resident the investigation related to or the date of the alleged errors. She had been barred from contact with her colleagues or line manager and had had no access to any records.

Investigation meeting 24/08/18

3.33. At the meeting, conducted by Ms Hall, Ms Moorcroft learned that the issue concerned the night of 2/08/18 to 3/08/18 (349). She had, as the nurse on duty, completed the daily nursing notes She says she had been asked by her colleague who covered the day shifts before and after her own to also record her observations on a separate sheet so it would be conveniently available to fax to the doctor the next day if needed.

3.34. The meeting considered the hand-written notes. The actual nursing log was not looked at. Ms Moorcroft acknowledged that handwritten notes like that were not the appropriate way of keeping records, but confirmed that she had maintained the proper records first. She agreed that the first of her observations on the hand-written sheet showed low oxygen, but that she had thought it might be a poor reading and had increased her observations. The next reading noted was at 10.00 (350) – an observation that would have been due at 9.00 pm was not shown. She acknowledged that her recording was poor.

3.35. The finding was that she made her records on a piece of paper, not in the proper nursing records (360, 364).

3.36. Suspension was lifted at that meeting, while the matter continued to a disciplinary.

First Disciplinary

3.37. A disciplinary hearing was held on 06/09/18 (356).

3.38. She was told she could have someone with her. She did not – she had not been in touch with the Royal College of Nursing for advice.

3.39. The list of documents provided and considered do not include any formal nursing notes, either the log or the NEWS reports (357, 359). No evidence is noted as "not collected". Her handwritten note of the observations of the night was produced (see 363 and 364 and attached note and 788 and 791).

3.40. The notes of the meeting were not sent to her and have not been produced (371).

3.41. The findings made were these:

- Failure to respond appropriately and swiftly to reduction of baseline observations
- Failure to record observations correctly
- Failure to safeguard a person we support (381)

3.42. The outcome rested on reliance on the handwritten note, without consulting the statutory nursing log, which showed the actual care and observations. The statutory nursing log showed that the 9.00 pm observation was not missed, and that in writing out the handwritten note, hurriedly, Ms Moorcroft had made a transcription error. The oxygen levels were not severely low: she had miscopied the pulse rate by mistake.

3.43. The outcome was a final written warning live for 12 months from 7/09/18 (381). She was required to complete Respiratory Specialist Nurse Training and have a session on the Management of the detreating patient using NEWS (National Early Warning System), and to undertake Reflective Practice, submitting it for her file.

3.44. Ms Moorcroft did not appeal.

January 2019 – second disciplinary

3.45. A resident – now known within this company as a PWS (person we support) - was discharged from hospital on 18/12/18 (526). Over the following five days there were a number of medication errors.

3.46. From the letter to the manager Mr Kentish from the Enquiry Manager in the local authority, copied to the CQC, the funding authority and the family, dated 29/03/19, this picture emerges,

> "On 22nd December, a medication error for SR was identified.
> Antibiotic (metronidazole and amoxicillin) should have been completed by 20th were given on 21st and 22nd
> Glycopyronium (salivation inhibitor) due 3 times a day had none in stock and none given from 21st to 24th

Diuretic medication given, frumil tab (new) with no dose on MAR chart, states it should replace co-amilofruse (previous medication) but both given until 21st. Now only co-amilofruse being given until clarification given by GP
Glycopyronium prescription requested on 22nd, not in stock with pharmacy but due on 24th for collection…." (526)

3.47. An investigation was instigated into five nurses who had been on duty over that period (387), including Mrs Moorcroft. The initial alleged misconduct was set out as including -

- "Failure to appropriately record medications on MAR charts
- Failure to follow guidance from GP, pharmacist or hospital in relation to the administration of medications
- Failure to report medication errors, administration errors or concerns over medication. Failure to complete UTEs (untoward event reports) when required for medication incidences
- Failure to seek medical advice or clarification to ensure the service user is safe and well
- Placing service user at risk of harm through medication errors
- Failure to complete your duties in line with policies and procedures, job description and best practice.

3.48. Ms Moorcroft was on duty on the 18/12/19 to the morning of 19/12/19. She was not on duty on any later dates over the period to 24/12/19.

3.49. An investigation meeting was held with Ms Moorcroft on 18/01/19, at 8.00 am, after a night shift, by Ms Hall (430). The invitation to the meeting explains that the six matters above were at issue in her case, in relation to medication errors between 17/12/18 (*sic)* to 22/12/18 (390).

3.50. Ms Moorcroft had been the first to receive the medication after the PWS's discharge from hospital. The discharge letter and medications had been left behind when he left hospital and arrived that evening (430).

3.51. The PWS had been discharged with amoxicillin and metronidazole, both antibiotics. Seven doses of both had been sent out from the pharmacy to complete that course (430, 445 and oral evidence Ms M). The medication was in capsule form, which had to be administered in liquid because the resident could not swallow. Both required doses to be administered three times daily. The courses were to be completed on 20/12/98 (445 – discharge summary; medication administration sheet 443, 430 investigation meeting). On 20/12/98, the medication should have been exhausted.

3.52. The MAR chart is supposed to be completed by the nurse handling new medication, and the quantity of the prescribed drug noted, with the nurse's signature. Ms Moorcroft is noted as agreeing that she had not completed the record accurately with those details: she had also not put a line through

against the medication to show when it would end on the MAR chart and signed against it. She had completed the statutory nursing log and she had spoken to the day nurse on handing over about the antibiotics (431 and oral evidence). She had administered the medication correctly – that is not at issue.

3.53. It is put to her that as a result of her failures, the resident had had an overdose of two days of antibiotics.

> "If you had put the line through on 21/12/18 to be completed that wouldn't have happened. That has basically led the nurses to continue giving the medication".

3.54. Each nurse is responsible for checking the medication and should have read the discharge notes themselves. This is recorded as a failure in the outcome of the disciplinary in respect of the other employed nurse as well as, in her case, the same failure as Mrs Moorcroft's error in respect of recording the end date of the antibiotics on the MAR chart (798/97, 417).

3.55. It remains unclear why the allegation is of an overdose of the antibiotics, given that only seven doses of each were prescribed (445 and 430, hospital discharge summary and the investigation notes, as explained by Ms Hall),

> "On the discharge document the patient's amoxicillin and metronidazole have a very clear set of instructions, ….. He had started the seven-day course in hospital, and they supplied seven more doses to complete on the 20 December 2018 of medication" (430).

3.56. If the medication had been correctly administered, the doses would have been finished at the right time. However, the allegation was that Ms Moorcroft had caused overdoses by her failure to show the end date.

3.57. Ms Moorcroft was invited to a disciplinary hearing on 18/02/19 (412). The allegations were:

- Failure to record medications correctly resulting in an overdose of antibiotics being given
- Failure to safeguard a person we support

3.58. With that invitation was a bundle of documents including the investigation reports, MAR sheets, notes, reports and information concerning other nurses, six witness statements relating to events concerning another nurse. The heading of the investigation report was titled "Nurses @ Boldings" (414 – 492)

3.59. In the Investigation Report is the following note,

> "Persons not interviewed
> Sarah failed to administer and record correctly like the other nurses involved. Sarah works limited shifts and I do not believe she could add any further information to the investigation process."

3.60. Sarah therefore is the sixth nurse implicated (416).

3.61. The investigation report notes a series of errors over medication. In respect of the 2 antibiotics, the end date was not recorded. The report refers to "extended administration" of the antibiotics and that a change in dose took place of the metronidazole, without reason, date or signature, on 21/12/19 (417). There was a double dose of diuretics. Amendments on the MAR charts were not signed or dated, booking-in of new medication was incomplete.

> "All nurses failed to see the errors and therefore did not report or seek medical attention for SR.
> All nurses acknowledged that they did not look back on the MAR chart and check their colleagues' entries to ensure there were not errors that they needed to address."

3.62. In respect of Ms Moorcroft, the findings of the investigation report were,

> "Sheila accepted that she did not complete the MAR chart correctly when SR was discharged, she did not give the instructions for 7 doses only, she did not sign or date her entries and she did not add the quantities booked in."

3.63. There are similar specific findings in respect of three other nurses interviewed. (418)

3.64. Three other nurses specifically were responsible for the double dose of diuretic, through failure to remove the earlier prescribed medication and failing to check before administering both. That began on 19/12/19 and did not involve Ms Moorcroft.

3.65. Three nurses were identified as responsible for the extended administration of antibiotics, administering doses on 19th, 20th, 21st and 22nd without checking the discharge summary. Those included the other employed nurse, but not Mrs Moorcroft.

3.66. For the medication to be administered on 21st and 22nd December, there must have been failures to administer the doses due on 19th and 20th. Oddly, that is not noted.

3.67. There was an unsigned and unexplained change in dose noted in respect of metronidazole on 21/12/19.

> "The other nurses obviously did not read the discharge form." Investigation report (417)

3.68. Ms Moorcroft was not implicated in failing to administer the right dose of medication on her shift or of administering the wrong medication, the double dose of diuretics, or of omitting any medication due.

3.69. There were other failures in relation to glycopryonium, when the prescribed medication ran out and was not replaced over four days. Ms Moorcroft is not identified as having contributed to this error. A different nurse had reported that issue as resolved when the medication remained unavailable to be administered.

3.70. Another nurse, not one of the two employed nurses, was identified as having been responsible for "several" of the "numerous" medication errors in the past year *(420).*

3.71. It is noted that the home has been under scrutiny, with only two permanent nurses, including Ms Moorcroft, and a very high agency nurse use *(420).*

3.72. Every nurse administering medication is responsible for checking the right dose and that it was being administered appropriately (oral evidence and investigation report).

3.73. There is a lengthy list of recommendations, relating to ordering, booking medication, handing over, management audit, training, in particular on recording, administering medication, reporting errors, and appropriate actions, checking the BNF (British National Formulary, the medication handbook) to avoid errors, safeguarding and supervision for all staff.

3.74. One other nurse – the other permanent nurse - had a disciplinary and was demoted, later reviewed on appeal.

3.75. The other nurses involved were agency nurses (Ms Fehilly, by inference from the evidence).

3.76. While Ms Moorcroft reports that the antibiotic concerned was administered in capsules, the report and investigation minutes also reflect discussion of liquid antibiotics. She felt there was confusion in the investigation about what her role had been.

3.77. She acknowledged recording errors – important, but plainly, from the investigation report, commonplace at that time. In relation to the following, eleven nurses are named,

> "All nurses appear to have failed to follow best practice and policy and procedures in relation to medication. Nurses have completed MAR sheets incorrectly, nurses fail to check MAR charts completed by their colleagues and report errors. There appears to be a level of complacency ("compliancy") in relation to medication." (418/9)

3.78. Beyond those errors, Ms Moorcroft is not shown as making or contributing to the multiple errors identified and that took place after her shift finished on the morning of 19th December.

3.79. The disciplinary hearing took place on 18/02/419 before Ms King, Regional Operations Director. Ms Moorcroft was not represented (493 - 497). She had been reassured by the investigating officer, as she had at the time of her first disciplinary, that this was not a matter for dismissal.

3.80. The charges were,

> "Your failure to record Medications correctly resulting in an overdose of Medications being given;
> Your failure to safeguard a person we support."

3.81. Ms Moorcroft acknowledged failing to record on the MAR the point at which the antibiotic should cease, with a date and signature. She had received an unbroken bottle for both the antibiotics, so for each there was the right number of doses (495). She agreed she had not written in the number of doses received.

3.82. In the outcome letter dated 22/02/19, the finding made was that,

> "You have admitted that you had made the medication errors and apologised for the mistakes that you made when adding the two new medications to the MAR chart."

3.83. There was no finding that Mrs Moorcroft had administered the wrong medication, or the wrong dose, or had omitted to administer medication. There is no explanation for the suggestion that she had caused an overdose, given that the discharge record showed only sufficient capsules issued to finish the course.

3.84. The sanction applied was that Ms Moorcroft was demoted to the position of care assistant, to work at the same care home (498). That was instead of dismissal, given that she was on a final written warning in respect of similar errors.

3.85. She would be working under people she had previously supervised and for the minimum wage. Her pay dropped to £7.90 per hour for weekdays or nights, £8.40 for weekend days or nights and £15.80 for bank holidays (498). The recommendation was made for a referral to the Nursing and Midwifery Council ("NMC") for consideration in respect of her nursing registration.

3.86. The letter states that, "I am happy for you to continue working at Boldings".

3.87. On 27/02/19, Ms Moorcroft was signed off sick and produced a one-month GP fit note citing (only) "work-related" (502). That was accepted as relating to work-related stress (529).

3.88. On 9/03/19, Ms Moorcroft appealed the disciplinary decision (503). She pointed out that although the reason given for the penalty was “failure to record medications correctly resulting in an overdose of antibiotics being given” she had in fact stated the correct medication and dose and frequency, so the error related only to the end date. Someone else was responsible for changing her entry for metronidazole from three times per day to twice per day, without date or signature.

3.89. The appeal was heard on 27/03/19. It was conducted by Ms Bates with a panel member. Ms Moorcroft was represented.

3.90. She confirmed again that she had not entered the end date on the MAR chart of the antibiotics, she had omitted signing one copy of the MAR, and she had not signed one of the drugs in (amoxicillin). She had handed over orally to a staff nurse who knew the patient, rather than using a signing over procedure as would have been good practice. She had not used the formal route for double checking the administration of amoxicillin (523).

3.91. In the outcome, the panel confirmed the demotion but added scope for her to request reinstatement to a nursing position after six months (519). The outcome would depend on her performance, her ability to demonstrate competence and willingness to undertake any learning or development.

3.92. The letter refers to her previous final written warning. The findings made on this occasion, were that she had not sought a counter signatory at the shift handover for the new medications. The MAR entries lacked dosage and end dates, or quantities received despite all those being clear in the discharge summary. She had failed to write the route of administration for the amoxicillin or to sign that entry (519).

3.93. The other permanent nurse also faced disciplinary proceedings.

3.94. This nurse is noted as admitting that she had not removed the Frumil when the other diuretic was received, hence double doses of diuretic being administered for three days. She personally administered both drugs on two days. She acknowledged she did not know they were the same and she had not looked them up in the BNF. She was aware of the potential for damage to the resident’s heart, kidneys and liver, in particular given the recent dehydration on admission to hospital, and the need for regular observations.

3.95. She had read the discharge summary but had not noticed that the antibiotics were due to complete on 20/12/18. Her failure to mark the antibiotics as completed or the end date contributed to the resident receiving further doses over two days.

3.96. She acknowledged not administering a dose of glycopyronium on 21/12/18. She had failed to report that the medication was missing. She knew the steps she should have taken on identifying a drug error and confirmed that she did not take action to seek further medical advice. She had not followed the Untoward Event procedure. As a result, the errors had not been picked up

until a carer referred the matter to management on 24/12/18 (798), when an emergency prescription was obtained.

3.97. That list does not include that she was in fact one of the nurses who administered the antibiotics incorrectly, as identified in the investigation report (419 and 798).

3.98. Again, the finding is of an overdose of antibiotics, without regard to the fact that the capsules should have finished if properly administered. The nurses on duty had administered the wrong doses of antibiotics but that was not recognised.

3.99. Oddly, the allegations put to the nurse did not include her repeated errors over the administration of medicine, although the findings include them. The sanction imposed was therefore for documentary errors (797).

3.100. She had also had a previous final written warning (799).

3.101. She was demoted to the role of care assistant. She was also issued with a final written warning.

3.102. That demotion, imposed on 6/03/19, was overturned on appeal on 12/06/19.

3.103. That nurse was reinstated to a nurse role, but with a condition of being supervised and working at a different care home. She was referred to the NMC. The reinstatement was in part because on an earlier disciplinary, although errors in the administration of medication had been found, only documentation errors had been the basis for sanction.

3.104. Given that history, neither permanent nurse was held to account for errors in the administration of medication, Ms Moorcroft because she had not made them and the other nurse because although she admitted to them, they had not been included in the allegations for which she was disciplined – for the second time, according to the appeal outcome (802).

3.105. On 29/03/19, Dee Scrivens, Enquiry Manager for Children, Adults, Families, Health and Education had written a summary in respect of the enquiry into safeguarding concerns raised in this series of incidents (526).

- Antibiotics (both) should have been completed by 20th but were given on 21st and 22nd
- Glycopyronium had not been administered from 21st to 24th and replacement stocks were only due on 24th.
- Two diuretics had wrongly been given together.

3.106. Amongst measures being taken were that two individuals (the two employed nurses) had been demoted to the role of care assistant and referrals were being made the NMC and DBS. Additional clinical oversight was provided, and,

> "The agency nurses we have been using within the home have been block-booked and are familiar with the people living at Boldings. There are 4 agency nurses we regularly use who have worked with us now for 14, 11, 9 and 4 months and on an ongoing basis.

3.107. From that it appears that the authority were unaware that ultimately neither demoted nurse had been held responsible for the errors in the administration of medication. Given that eleven nurses had been found responsible for documentary errors such as Mrs Moorcroft's, it remains a possibility that those four agency nurses referred to were amongst those who contributed to the errors, but we do not know.

Sickness absence management

3.108. Mrs Moorcroft supplied a GP fit note signing her off from 25/03/19 to 30/04/19 and citing work-related stress (525).

3.109. There was a sickness absence review on 09/04/19 (529).

3.110. Mrs Moorcroft was invited to sign a consent form for an Occupational Health assessment but failed to do so because she could not face filling in the form.

3.111. An "informal wellbeing meeting" was planned for 24/05/19, later changed at Ms Moorcroft's request to 30/05/19 (540, 549).

16/05/19 – the Grievance

3.112. On 16/05/19, Mrs Moorcroft raised a grievance with Mrs Jones, the then Director of HR, asking her to review the first disciplinary hearing on the basis that there had been an error caused by the failure to consult the actual nursing log (541). The disciplinary had been conducted on the basis of her handwritten summary, prepared at the end of the shift, on which she inaccurately recorded oxygen levels at 83% at 20.00 and omitting an observation at 21.00. The log showed the correct observations including the one at 21.00. The actual oxygen level at 20.00 was 93% and the next one at 21.00 94%. There had been no failure to respond to a grossly reduced oxygen level. She had not earlier had access to the actual nursing log, on the basis of which she could have defended the case. She produced a copy of it with the Grievance.

3.113. She said there were failures too in the later investigation and in the appeal.

3.114. In relation to the second investigation, she says "It was not possible to overdose the service user with the antibiotics as the required dosage to complete the course were provided by the pharmacy at East Surrey Hospital." There was no possibility of an overdose unless a further prescription was ordered.

3.115. The investigation report dealt with a range of medicine errors involving other nurses which had been confusing and misleading: it was not clear what she was accused of and she says the panel must have been equally confused.

3.116. She had been asked about bottles of liquid medication when the prescription was of capsules.

3.117. She had also established by fuller investigation that while she had earlier admitted to errors in recording on the MAR sheet, what she had written had been correct – her error had been only in relation to outing in a line after the medication had finished.

3.118. The appeal panel had also refused to consider alterations to the MAR chart made by someone unidentified and unexplained.

3.119. She also complained of a casual remark made about her PIN status by Ms Bryce, the former director of HR (546).

3.120. She asked for further disclosure including the nursing notes and other documents relating in particular to the first investigation and the transcript and recording of the disciplinary meeting of 6/09/18.

3.121. She also asked to know if reports had been made to the NMC and DBS (547) following the second disciplinary.

3.122. On 23/05/19, Mrs Jones declined to review the outcome of the previous disciplinaries or to take further the complaint about Ms Bryce who had left the organisation. She did agree for the 16 documents or categories of documents to be sent (551). (They have not all been received.)

3.123. Ms Fehilly, who was of course not in post at that time, was able to put this in context,

> "Our policy makes it quite clear that anything to do with disciplinary comes under the disciplinary procedure. … We don't have an appeal process that allows for two appeals."

3.124. Mrs Moorcroft submitted a doctor's note signing her off from 25/05/19 to 21/06/19, again with work-related stress (556).

3.125. The Wellbeing meeting, now headed "Wellness Meeting", took place on 30/05/19 (553). Ms Moorcroft explained that she was not willing to come back to Boldings as a care assistant. There was discussion of the grievance, and Ms Moorcroft's submission of new evidence in respect of the first disciplinary and of the failures of the investigation in relation to the second disciplinary, and the witness statements disclosed to her that did not relate to her at all but to the other nurses concerned.

3.126. The invitation to the meeting had referred only to an informal wellbeing meeting (540). In the report issued following it, on 5/06/19, it is referred to as an Occupational Health Assessment Review Meeting (Stage 2) (559).

3.127. Given Ms Moorcroft's failure, described as refusal, to consent to a further report from Occupational Health, coupled with her refusal to return as a care assistant, it was suggested in that report that if she did not return by Monday 8/07/19, a Stage 3 Sickness Absence Hearing would be arranged. That could lead to termination of her employment on the grounds of capability (560).

3.128. She had not been told that there were stages to the sickness procedure or that they were being applied to her, nor are these stages reflected in the policies produced.

3.129. There is no specific Sickness Absence Policy that has stages. There is a Capability Policy which has stages. It is primarily about performance but states that it is to work in tandem with the sickness policy. Stage 1 requires a warning; stage 2 requires a final written warning. Stage 3 moves to dismissal.

3.130. She had not been through stages 1 and 2 or known that this policy was being applied.

3.131. Referral to the NMC was still in hand; the Regional Operations Director noted in an email on 5/06/19, "I will pick this up and make sure that the referral is made" (560).

3.132. In response to the letter of 5/06/19, Ms Moorcroft completed the consent form for the Occupational Health referral.

Penalty review

3.133. The two employed nurses had both been demoted following the incident in December 2018. The other nurse appealed and secured reinstatement to work as a nurse, albeit under supervision, on 12/06/19.

3.134. Given that changed outcome for the other nurse, the Respondent decided to review the penalty imposed on Ms Moorcroft, inviting her to a meeting by email written on 20/06/19.

3.135. On 26/06/19, in a meeting with Ms Jones, she was offered reinstatement to a nurse position with a transfer to a different care home, and a three-month development and support plan (569). The proposal was for her to work days rather than her two night shifts, and as a supernumerary until she had been signed off as competent in all areas. It was described as the same outcome as for her colleague.

3.136. The proposal was for a move to a larger care home, further away from where she lived.

3.137. The transfer elsewhere was not proposed as temporary.

3.138. This was the first notification to her of the proposed change (oral evidence).

3.139. In the notes of the meeting, there is no indication of consultation.

> ""You will not be based at Boldings, you will be moved to Rapkyns care village, to The Laurels…… You will not be able to work nights because of the support you will need. Instead of two 12 hours nights you can do two 12 hour days. You will be supernumerary until you have been signed off as competent in all of the areas."

3.140. Ms Fehilly is clear that normal practice would involve consultation. The proposal was made and it was left to Mrs Moorcroft to consider. No alternative was offered.

3.141. There is no reference to the adjustments previously agreed for her to work on non-consecutive nights or consideration of her medical history, her disability, the need for any adjustments. Those things were not discussed. This was not an occasion on which there was any evaluation of her competence or culpability. It was simply the substitution of a transfer on a disciplinary basis for demotion, both sanctions available under the policy where there has been either gross misconduct or further issues arising after a final written warning.

3.142. The Laurels was further away, with up to 41 residents, including fit young adults with profound learning difficulties. It had received poor CQC reports. (597 – 633). There were reports of behavioural difficulties including challenging and aggressive behaviour. Ms Moorcroft felt unable to cope with that.

3.143. Ms Moorcroft rang Ms Rogerson in HR on 27/06/19, expressing unhappiness over being moved to The Laurels, having spoken to her GP. She reported that the doctor, "…is concerned that the change to the Laurels may be detrimental to Sheila's health," as Ms Rogerson reported to Ms Jones. The doctor could not understand why Ms Moorcroft was being moved. She asked for Kingsmead to be considered rather than The Laurels (572) but wanted to remain at Boldings.

3.144. Ms Moorcroft was seen by Occupational Health on 3/07/19 (573). The Occupational Health referral had been arranged before this decision was made – it was not in response to Ms Moorcroft's reservations about the transfer. The report describes work-related stress,

> "Shelia said that she still feels stressed and upset over the situation at work. She described various symptoms of this including poor sleep and concentration, low mood, over-eating and skin problems. In other words she remains subject to reduced levels of psychological wellbeing which she attributes to the situation at work.
>
> She said that all of this had impacted on her feeling able to go out. She said she believes the thought of moving to a different home is adding to her stress, partly not knowing the home, but also that the journey would

be about 30 minutes rather than the 3 minutes to where she had been working."

3.145. The report continues,

> "I believe that the issues in this case are primarily employee relations matters causing Sheila emotional upset and she would otherwise be at work.
>
> The ultimate solution is therefore likely to be management not OH orientated as she states symptoms are directly attributed to specific issues in the workplace" (574).

3.146. The report also draws attention to "her previous and underlying medical conditions, and the importance of her maintaining her general wellbeing." The discussion that follows is about cancer risks.

3.147. Her over-eating is noted a stress response. It is noted that the proposed move to a new workplace was adding to her stress reaction (575).

3.148. From a medical perspective, the writer saw no reason why Ms Moorcroft should be unable to carry out the full range of duties, "assuming any ongoing reduced concentration and disturbed sleep do not adversely impact on her".

Resignation

3.149. Ms Moorcroft felt she was facing further disciplinary action if she did not return to work on 08/07/19 as stipulated in the email of 5/06/19, after the meeting of 5/06/19.

3.150. Ms Moorcroft submitted her resignation letter dated 7/07/19 (576), a Sunday. She refers to the fact that it had been agreed that the disciplinary sanctions had been too harsh. But the plan made was one she saw as detrimental to her health and that would cause her more mental and physical stress.

3.151. With her resignation letter, Ms Moorcroft provided a letter from her GP dated 1/07/19, supportive of her remaining at Boldings and Orchard (577). It refers to her prolonged absence for work-related stress, and then,

> "Sheila tells me that she is to return to work, not at her previous place of work, which was Boldings and Orchard, but at a new place for her, the Laurels. She is finding this thought very stressful and would far rather return to her previous place of work.
>
> I am concerned that recommencing work in a new and strange environment may be detrimental to her mental health.

> Mrs Moorcroft tells me that she will need to work two long days in order to complete a course and she is happy to do this, but after this period she would very much like to return to her usual hours of work"

3.152. Ms Rogerson consulted the Head of HR, Ms Jones and passed on the GP advice. As a result of internal discussions, Ms Moorcroft was invited to a meeting on 17/07/19 to discuss her resignation with Ms Rogerson (580).

3.153. The recent medical evidence highlighting the stress of the proposed move was not discussed. No alternative to the transfer to The Laurels was put forward by the Respondent.

3.154. Asked why she had resigned, she said that, "No-one has considered the fact that I didn't do anything to get gross misconduct".

3.155. She asked why it was ok for her to come back to Boldings as a care assistant but not as a nurse. There was no reply. Ms Rogerson only discussed her working at The Laurels, Ms Moorcroft was only willing to return to Boldings.

3.156. Ms Moorcroft was reluctant to work days, but Ms Rogerson told her that once the development plan was complete, she could go back to her former pattern.

3.157. Ms Moorcroft wanted to return to Boldings as a nurse.

> "I am not choosing to leave, I have been made to leave." (581)

3.158. Her concerns were that The Laurels had a different type of resident. She felt The Laurels to be mentally and physically challenging for her, given the client group served. She did not feel strong enough to go there. There were problems for her in transferring to day work, given her caring responsibilities for her partner. She knew the home to have had critical reports, including from a CQC report based on inspection in February 2018. It is described as a large clinical setting, and the summary highlights instances of physically challenging behaviour. There had been multiple safeguarding investigations. In her evidence, she expressed concern about being able to cope with that setting (598 and oral evidence). In addition, it was a home that she did not know, her travel would be more difficult and would take longer.

3.159. The Respondent took the view that for her to be a supervised nurse on a development plan, she needed to be working day shifts (LF para 38).

3.160. Ms Moorcroft was invited to a further meeting on 1/08/19 to discuss her resignation by Ms Jones. That letter, dated 24/07/19, explains the decision not to allow her to return to Boldings in these terms,

> "This (resignation) is concerning and disappointing as I am sure that we can reach a suitable compromise to enable you to return to work. As discussed, SHC has a duty of care and we must protect you and the staff

> at Boldings. One of the key reasons for not placing you back at Boldings is the fact that many of the staff there provided witness statements during the disciplinary processes. In our view, it would be remiss of SHC to place you back at Boldings because of this, and the difficulties that it may create for you and other staff" (587).

3.161. The statements referred to (423 on) do not relate to Ms Moorcroft. They relate to the other permanent nurse and raise a number of issues concerning her professionalism, including allegations of concealing medication errors and bullying or trying to bully colleagues into doing the same. Other nurses are mentioned and there are admissions of error. The accounts relate primarily to events from 22/12/19. Ms Moorcroft is not mentioned. Her last shift ended on the morning of 19/12/19.

3.162. Ms Moorcroft declined to attend that meeting but instead confirmed that her resignation stood, in a detailed letter dated 29/07/19. She pointed out the error in relation to the witness statements,

> "There were no witness statements that I can identify in the second disciplinary hearing that would have prevented my return to Boldings and Orchard Lodge" (589).

3.163. She reiterated the unfairness of her first disciplinary process, given the failure to consult or provide the statutory nursing notes and that the simple error she acknowledges in copying the formal notes onto a separate sheet did not merit the final written warning. Failing to check the actual records led the panel into serious error. She reiterated her unhappiness at having her grievance of 16/15/19 dismissed out of hand on the basis that no second appeal can be brought, notwithstanding what she described as the gravity of the error in the investigation.

3.164. She reiterated the unfairness of her second disciplinary process. Reliance on a report dealing with "All Boldings Nurses" (a reference to the report "Nurses @ Boldings") led to the failures in the disciplinary hearing arising from the inclusion of the concerns about the other nurses. She notes that the only action taken by the Respondent was against the permanent nurses. There had been a lack of clarity over the allegations, given that all nurses were dealt with together. The outcome had been influenced through the unfair earlier final written warning. The sanction imposed for her had career and life-changing consequences. The demotion had been unlimited, and the appeal had only produced the possibility of a review after six months, if the Respondent decided that was appropriate. There would be real difficulties for her as a nurse in working as a junior carer at Boldings Lodge and Orchard Lodge, while remaining, as a registered nurse, under the Nurses' Code of Conduct and duty of care in a situation where there was a permanent shortage of nursing and care staff. To report to staff that used to report to her

would be stressful and precarious, given the consequences of any perceived infraction.

3.165. It was unreasonable to review the penalty without responding to her grievance asking for review of the disciplinary. It was unreasonable now to insist that she did not work at Boldings as a nurse when it had been seen as satisfactory for her to work there as a care assistant.

3.166. Her request to work with staff and residents she was familiar with at the care home she was familiar had not been considered as a reasonable adjustment notwithstanding the terms of her GP letter and the Occupational Health report.

3.167. She considered there to be nothing more to pursue with the respondent to try to rectify the situation and that her nursing registration, her PIN number, was in jeopardy if she remained in that employment (589). She raised again the comments she had complained of on 16/05/19, which Ms Jones had not treated as a grievance, when, in a discussion about a possible further Occupational Health report, given her current stress and anxiety of her situation, there had been inappropriate comments including about her PIN, without which she could not work as a nurse.

3.168. 09/08/19 Ms Jones wrote. She offered to treat the letter of 29/07/19 as a formal grievance. She noted that a number of issues had been raised and added that she believed they had been addressed previously and so did not intend to respond in any length. She did not refer to the point made about the content of the witness statements being unrelated to Ms Moorcroft. She accepted the resignation (590).

3.169. In that letter, for the first time, the offer made on 26/06/19 is set out. It was for her to be reinstated to a nurse position at a different location, and for a 3 month programme of development and support to address areas of performance that require improvement. Once she was confirmed as “fully developed”, a return to night duties would be considered.

3.170. Mrs Jones relies on her previous letter as to the reasons for not permitting Ms Moorcroft to return to work at Boldings, and, “There is not much that we can do given that you have submitted your resignation and do not wish to meet to discuss this matter further.”

3.171. Ms Fehilly confirms that a grievance can be considered after employment has been terminated.

3.172. Given a resignation with immediate effect on 7/07/19, a Sunday, the last day of employment was 8/07/19, when the resignation was seen.

3.173. Ms Moorcroft was not referred to the NMC nor did the Respondent write to say that no referral would be made.

4. **Law**

Constructive Dismissal

4.1. A termination of the contract by the employee will constitute a dismissal within section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996") if he or she is entitled to so terminate it because of the employer's conduct. That is a constructive dismissal.

4.2. For the employee to be able to claim constructive dismissal, the employee must establish that the following four conditions are met:

i) There must be a breach of contract by the employer.
ii) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.
iii) The employee must leave in response to the breach and not for some other, unconnected reason.
iv) The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may be deemed to have waived the breach and agreed to the variation of the contract or affirmed it.

4.3. A repudiatory breach of contract is a significant breach, going to the root of the contract *(Western Excavating (ECC) Ltd v Sharp [1978] ICR 221). That* is to be decided objectively by considering its impact on the contractual relationship of the parties *(Millbrook Furnishing Industries Ltd v McIntosh (1981) IRLR 309).* The fact that the employer may genuinely believe that the breach is not repudiatory is irrelevant.

4.4. It also follows that there will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach, then the employee's claim will fail *(see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] IRLR 35).*

4.5. Employment contracts contain an implied term of mutual trust and confidence. The parties to the contract will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between employer and employee *(Malik v BBCI SA (in liq) [1998] AC 20*).

4.6. It is not simply about unreasonableness or unfairness. The question is whether the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence.

4.7. it is not necessary in each case to show a subjective intention on the part of the employee to destroy or damage the relationship, a point reaffirmed by the EAT in *Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT*. As Judge Burke put it:

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

4.8. The Court of Appeal in *Lewis v Motorworld Garages Ltd [1986] ICR 157* held that a course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident, even though that incident by itself does not amount to a breach of contract. In *Omilaju v Waltham Forest London Borough Council [2005] ICR 481,CA,* it was stated that the last straw does not have to be of the same character as the earlier acts in the series, but it must contribute something to the breach of trust and confidence.

4.9. An employee who is the victim of a continuing, cumulative breach of contract is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation *(Kaur v Leeds Teaching Hospitals NHS Trust, [2019] ICR 1, CA) ("Kaur").* In that case guidance is given on the approach for Tribunals:

i) What is the most recent act (or omission) triggering resignation?
ii) Has he or she affirmed the contract since that date?
iii) If not, was that act or omission itself a repudiatory breach of contract?
iv) If not, was it part of a course of conduct which viewed cumulatively amounts to a repudiatory breach of trust and confidence?
v) Did the employee resign in response – or partly so – to that breach?

4.10. The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end, but the election to affirm is not required within any specific period.

4.11. Delaying too long or, by conduct, indicating acceptance of the change, can point to affirmation. It is not simply a matter of time, in isolation. In *WE Cox Toner (International) Ltd v Crook, [1981] IRLR 443*, it is established that mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Simply continued working and the receipt of wages points towards affirmation. Nevertheless, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation.

Disability – as a protected ground

4.12. Disability is a protected characteristic under the Equality Act 2010, section 4. The Act says that a person has a disability if they have a physical or mental impairment which has a long-term and substantial adverse effect on their ability to carry out normal day-to-day activities.

4.13. Long-term means that the impairment has lasted or is likely to last for at least 12 months or for the rest of the affected person's life. Substantial means more than minor or trivial (Schedule 1, paras 2 and 5).

4.14. There is no need for a medically diagnosed cause for the impairment. What is important is the effect, not the cause (Code of Practice in Employment, 2011, Appendix 1, para 7)

4.15. Someone who has or has had cancer is automatically treated as disabled.

4.16. Whether an impairment has lasted or is likely to last at least 12 months at the time of the discriminatory acts is to be judged by reference to facts and circumstances at the time of those acts and not later *(Richmond Adult Community College v Richmond [2008] EWCA Civ 4).*

Direct Discrimination - section 13

4.17. Direct discrimination is provided for under the Equality Act 2010 ("EA 2010") by section 13(1):

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'

4.18. By section 39(2) of the EA 2010,

> ‘An employer (A) must not discriminate against an employee of A’s (B)
> (a) as to B’s terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by subjecting B to any other detriment.’

4.19. The words “because of” mean that the protected characteristic must be a cause of the less favourable treatment, but it does not need to be the only or even the main cause. For it to be a significant influence or an effective cause is enough.

4.20. Motive or intention is not required.

4.21. Detriment does not require a physical or economic consequence; it is sufficient that a reasonable person might take the view that they have been disadvantaged:

> “Detriment exists if a reasonable worker would, or might, take the view that the treatment accorded to her had in all the circumstances been to her detriment. It is not necessary to demonstrate some physical or economic consequence.” (Shamoon v Chief Constable of RUC [2003] IRLR 285 HL)

4.22. As the Equality Act Statutory Code of Practice on Employment (the “Code of Practice”), explains, at paragraph 3.5:

> ‘It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.’

The comparator

4.23. Essential to the consideration of less favourable treatment is the question of comparison.

4.24. By section 23 of the EA 2010,

> “On a comparison of cases for the purposes of sections 13, 14 and 19, there must be no material difference between the circumstances relating to each case.”

4.25. This is dealt with by the Code of Practice at paragraphs 3.22 onwards. In disability cases, an appropriate comparator, according to the Code, at paragraph 3.20 “will

be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself)."

4.26. The other approach is to say but for the relevant protected characteristic, would the claimant have been treated in this way? That may be helpful in identifying a hypothetical comparator (Code of Practice, 3.27).

Discrimination arising from disability – section 15

4.27. By section 15(1) of the EA 2010,

> "A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

4.28. The Code of Practice sets out at paragraph 5.7 that this means placing someone at a disadvantage. Even if an employer thinks they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

4.29. By section 15(2) of the EA 2010, the above does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

4.30. The focus of section 15 is about the extent to which the employer is required to make allowances for disability *(General Dynamics Information Technology v Carranza [2015] EAT 0107).* The consequences of a disability include anything that is the result, effect or outcome of a disabled person's disability.

4.31. There are four elements for a claimant to succeed in a section 15 claim.

- There must be unfavourable treatment
- There must be something that arises in consequence of the claimant's disability
- The unfavourable treatment must be because of (ie, caused by) the something that arises in consequence of the disability, and
- The respondent cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

4.32. There is no requirement for a comparator.

4.33. The analysis required is explained in *Basildon v Turrock NHS Foundation Trust v Weerasinghe [2015] UKEAT 0397, [2016] ICR 305.* There are two causative steps to be established. The first is that the disability has the consequence of “something”. It causes “something” or leads to “something”. That might be, for example, a need for frequent visits to the toilet, or a difficulty in speaking to strangers on the telephone. The second is that the claimant is treated unfavorably because of that “something”; the treatment arises in consequence of it.

4.34. It does not matter in which order that is addressed. Either way, the reason for the treatment and what it is that arises from the disability have to be addressed.

4.35. Simler P in *Pnaiser v NHS England [2016] IRLR 170, EAT*, gave the following guidance as to the correct approach to a claim, adopting and developing the guidance in Weerasinghe.

'(a) 'A tribunal must identify the unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant:

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. This involves an objective question and does not depend on the thought processes of the alleged discriminator.

4.36. If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified” *(para 5.21 Code of Practice).*

4.37. In terms of burden of proof, in a section 15 claim, in order to prove a prima facie case of discrimination, the claimant will need to show:

- That she has been subjected to unfavourable treatment
- That she is disabled and that the employer had actual or constructive knowledge of this
- A link between the disability and the “something” that is said to be the ground for the unfavourable treatment

- Some evidence from which it could be inferred that the "something" was the reason for the treatment.

4.38. In *Cummins Ltd v Mohammed (UKEAT/0039/20/00),* the Tribunal is reminded that it is essential to consider why the decision-maker acted as he or she did: what is the reason for the impugned treatment?

4.39. If unfavourable treatment is because of something arising in consequence of the disability, it will be unlawful unless it can be objectively justified, or unless the employer did not know and could not reasonably have been expected to know that the person was disabled. If the employer can show that the reasons for the unfavourable treatment arose from another cause, and not the "something" arising in consequence of the disability, that is a further basis for defeating the claim.

Indirect Discrimination - section 19

4.40. Indirect discrimination is defined in section 19 of the Equality Act 2010 in this way:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ("*PCP*") which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

4.41. Subsection (3) lists the relevant protected characteristics, which include disability.

4.42. All four conditions in subsection (2) must be met before a successful claim for indirect discrimination can be established. In other words, there must be a PCP which the employer applies or would apply to employees who do not share the protected characteristic of the claimant; that PCP must put people who share the claimant's protected characteristic (here, disability) at a particular disadvantage when compared with those who do not share that characteristic; the claimant must experience that particular disadvantage; and the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

4.43. It is for the claimant to establish that the first three elements apply – that there is a PCP applied to a pool, that it disadvantages those sharing the protected characteristic generally and that creates a particular disadvantage to the claimant. At that point, it is for the respondent to justify the PCP as a proportionate means of achieving a legitimate aim.

4.44. In Essop v Home Office, Supreme Court, [2017] 1 WLR, the difference between direct and indirect discrimination is explained by Lady Hale, as follows.

> "Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot. – (Essop, para 25)
>
> "…The reasons why one group may find it harder to comply with the PCP than others are many and various (Mr Sean Jones QC for Mr Naeem called them "context factors"). They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between "women's jobs" and "men's jobs" or the practice of starting at the bottom of an incremental pay scale."
>
> "These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem. (para 26)"
>
> "…There is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty

> whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory*. (Essop, para 27)*

4.45. It is not necessary to show why the PCP puts people sharing a protected characteristic at a disadvantage *(Essop)* The key element is the causal link between the PCP and the particular disadvantage suffered by the group and the individual.

4.46. For the purposes of assessing the impact of the PCP on the group sharing the protected characteristic as against the wider group, the pool of all those affected by the PCP has to be identified. The Statutory Code of Practice (2011), prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006, at para 4.18, advises that:

> "In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, while excluding workers who are not affected by it, either positively or negatively."

4.47. In other words, all the workers affected by the PCP in question should be considered.

4.48. The comparison must then be made with those sharing the protected characteristic. The Code at paragraph 4.19, says this,

> "Looking at the pool, a comparison must be made between the impact of the provision, criterion or practice on people without the relevant protected characteristic and its impact on people with the protected characteristic."

4.49. What is being considered is the particular disadvantage suffered by the group sharing the protected characteristic when the PCP is applied, that is, the disparate impact on that group as against the wider group. The test considers the intrinsic disadvantage to the group with the protected characteristic arising from the general application of the PCP to the wider pool.

4.50. In the context of disability, it is not straightforward to identify the disadvantaged group. By section 6(3)(b) of the Act, in relation to disability, a reference to persons who share a protected characteristic is a reference to persons who have the same disability. There is no room for easy assumptions that people who have the same disability can be regarded as having the same difficulties. A disabled person can bring a claim even where no other employees share the same disability, but there must be some evidence that the disability and its relevant effects are in fact shared by others, unless the matter is so obvious that Judicial Notice can be taken.

4.51. Judicial notice is the name given to common knowledge that is accepted by a court or tribunal as being so well known and accepted as to not require evidence to support it.

4.52. Indirect discrimination on the grounds of disability does not depend on an employer's knowledge or constructive knowledge of the claimant's disability.

4.53. A PCP is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. In *Hampson v Department of Education and Science [1989]* in the Court of Appeal, Lord Justice Balcombe said the true test involved striking "an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition".

4.54. As Mummery LJ explained in *R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:*

> ". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

4.55. He went on, at [165], to commend the three-stage test for determining proportionality derived from *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80*: -

- Is the objective sufficiently important to justify limiting a fundamental right?
- Is the measure rationally connected to the objective?
- Are the means chosen no more than is necessary to accomplish the objective?

Failure to make reasonable adjustments - section 20

4.56. The EA 2010, by section 39(5), imposes a duty on employers to make reasonable adjustments.

4.57. The duty is set out at section 20 of the EA 2010.

4.58. The duty comprises three requirements. Here the first is relevant and that applies where a provision, criterion or practice of A's (the employer) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

4.59. A failure to comply with those requirements is a failure to make reasonable adjustments. By section 21(1) and (2), "A discriminates against a disabled person if A fails to comply with that duty in relation to that person".

4.60. The duty does not arise where A did not know and could not reasonably be expected to know that B has a disability and is likely to be placed at the

disadvantage referred to – that is the effect of schedule 8, paragraph 20, as amended, to the EA 2010. However, the employer must do all they can reasonably be expected to do to find out whether a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. So, knowing of a condition such as dyslexia, the employer has a duty to do what it reasonably can to establish the effects of that and so avoid the risk of a substantial disadvantage arising.

4.61. Guidance is given in the ACAS Code of Practice in Employment (2011), at paragraph 6.19,

> What is reasonable to do will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

4.62. The following example is then given,

> "A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements."

4.63. In *Wilcox v Birmingham CAB Services Ltd [2011] Eq:R.S810*, the EAT took the view that unless the employer had actual or constructive knowledge of the disability, the question of substantial disadvantage did not arise. An employer will be taken to have the requisite knowledge provided that they are aware of the impairment and its consequences. There is no need for them to be aware of the specific diagnosis *(Jennings v Barts and the London NHS Trust [2013] Eq:R 326 EAT*). If an agent or employee knows in that capacity of a worker's disability, the employer will not usually be able to claim that they do not know (see para 6.21 of the Code).

4.64. Where a disabled person keeps a disability confidential, no duty arises for the employer "unless the employer could reasonably be expected to know about it anyway." (Code para 6.20)

4.65. And,

> "If a disabled person expects an employer to make a reasonable adjudgment, they will need to provide the employer … with sufficient information to carry out that adjustment."

4.66. No like for like comparator is required – the comparison may be between those who could do the job and the disabled person. As explained *in Royal Bank of Scotland v Ashton ([2011] ICR 632)*, the tribunal must identify the non-disabled comparator or comparators. That may be a straightforward exercise,

> "In many cases, the facts will speak for themselves and the identity of the non-disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play." (*Fareham College Corporation v Walters ([2009] IRLR 991)*

4.67. There is no onus on the disabled worker to suggest what adjustments ought to be made. It is good practice for employers to ask. If the disabled person does make suggestions, the employer should consider whether such adjustments would help overcome the substantial disadvantage and whether they are reasonable. (Code of Practice para 6.24)

4.68. It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. … It is advisable to agree any proposed adjustments with the disabled worker in question before they are made. (Code of Practice para 6.32.)

4.69. In considering whether there has been a failure to make reasonable adjustments, the tribunal must identify the nature and extent of the substantial disadvantage relied on by the claimant; make positive findings as to the state of the respondent's knowledge of the nature and extent of that disadvantage and assess the reasonableness of the adjustment that it is said could and should have been taken in that context.

4.70. The process for the Tribunal therefore is to identify:

> (a) the employer's provision, criterion or practice which causes the claimant 's disadvantage
> (b) the identity of the persons who are not disabled with whom comparison is made
> (c) the nature and extent of the substantial disadvantage suffered by the employee
> (d) what step or steps it is reasonable for the employer to have to take to avoid the disadvantage *(General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43).*

4.71. The Tribunal must identify all of those to judge whether the proposed adjustment is reasonable. There is no need to find that the adjustment would have prevented the adverse effects. The Tribunal is entitled to find that the adjustment proposed was a reasonable option with a not unreasonable chance of success *(The Environment Agency v Rowan [2008] IRLR 20).*

4.72. Assessing the reasonableness of any particular step, relevant factors will be how effective it will be in preventing the substantial disadvantage, how practicable it is, how much it will cost and how disruptive it may be, the size and resources of the employer and the nature of the business. It may also be relevant that external resources are available to help provide adjustments (Code para 6.28).

4.73. Failure to make a reasonable adjustment cannot be justified, but only reasonable steps fall within the duty. Whether or not adjustments were reasonable in the circumstances is to be determined by the employment tribunal objectively, *(HM Land Registry v Wakefield [2009] All E R 205 (EAT).*

Harassment - section 26

4.74. By section 26(1) of the EA 2010,

> "A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of
>
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

4.75. In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must, by section 26(4), be taken into account –

> "(a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect."

4.76. Harassment is discussed in Chapter 7 of the Code of Practice. Paragraph 7.8 explains that,

> "The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment."

4.77. Paragraph 7.9 explains that "related to" has a broad meaning, in that the conduct does not have to be "because of" the protected characteristic. In content or context, the question is, is the conduct anything to do with the disability?

4.78. Section 26(4) is more fully discussed at paragraph 7.18 of the Code. The perception of the worker is a subjective question and depends on how the worker regards the treatment.

4.79. In paragraph 15 of *Richmond Pharmacology v Dhaliwal 2009 [IRLR] 336,* the nature of harassment is explored in similar terms:

> "The proscribed consequences are, of their nature, concerned with the feelings of the putative victim; that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a "subjective" element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. ….It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence…..:"

4.80. The concept of detriment does not include conduct that amounts to harassment (EA 2010, s212(1)). Harassment and direct discrimination claims are therefore usually mutually exclusive. Victimisation and harassment too are mutually exclusive, given that section 27 of the Act specifically refers to detriment as part of the definition of victimisation. However, unfavourable treatment in section 15 (discrimination arising from disability) is not to be equated with *detriment (The Trustees of Swansea University Pension and Assurance Scheme, Swansea University v Mr A Williams (UKEAT/0415/14/DM)*

Victimisation - section 27

4.81. Section 27(1) of the EA 2010 provides that:

> "A person (A) victimises another person (B) if A subjects B to a detriment because –
> B does a protected act . . ."

4.82. A protected act includes bringing proceedings under the Act: s 27(2). There is no concept of less favourable treatment as such in this formulation of the wrong. However, if a tribunal finds that the reason for particular conduct adverse to an employee is victimisation, there is implicit in that conclusion a finding that but for having taken the protected act, the employee would have been treated more favourably.

Burden of proof

4.83. By section 136(2) and (3) of the EA 2010, the test in respect of the burden of proof is set out:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.'

4.84. The switching of the burden of proof is simply set out in the Code at para 15.34:

> "If a claimant has proved facts from which a tribunal could conclude that there has been an unlawful act, then the burden of proof shifts to the respondent. To successfully defend a claim, the respondent will have to prove, on balance of probability, that they did not act unlawfully. If the respondent's explanation is inadequate or unsatisfactory, the tribunal must find that the act was unlawful."

4.85. For the burden of proof to shift, the claimant must show facts sufficient – without the explanation referred to – to enable the tribunal to find discrimination. The Barton guidelines as amended in the Igen case *(Igen v Wong, 2005 IRLR 258 CA),* remain the basis for applying the law notwithstanding the re-enactment of discrimination legislation in the 2010 Act. It is those guidelines that establish the two-stage test,

> "The first stage requires the complainant to prove facts from which the Employment Tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld *(Peter Gibson LJ, para 17, Igen)*

4.86. The Tribunal is required to make an assumption at the first stage which may be contrary to reality.

4.87. In *Hewage v Grampian Health Board [2012] UKSC 37,* the application of the Barton/Igen guidelines to cases under the EA 2010 is approved at the highest level. At paragraph 33, Lord Hope, on the burden of proof provisions, says,

> "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence…"

4.88. In *Laing and Manchester City Council and others, 2006 IRLR 748,* the correct approach in relation to the two-stage test is discussed,

> "No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case…. (para 73)
> The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race (*or other)* discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'there is a nice question as to whether the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'.

4.89. The nub of the question remains why the claimant was treated as he or she was:

> "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." *(Madarassy v Nomura International plc) 2007 IRLR 246).*

4.90. In that case, in a judgment later approved by the Supreme Court in Hewage, above, Mummery LJ pointed out that the employer should be able to adduce at stage one evidence to show "that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant."

4.91. The "something more" that may lead a Tribunal to move beyond the difference in status and treatment need not be substantial – it may be derived from the factual context including inconsistent or dishonest explanations *(see Base Childrenswear Ltd v Otshudi 2019 EWCA Civ 1648 CA; Veolia Environmental Services UK v Gumbs EAT 0487/12.*

4.92. The presence of discrimination is almost always a matter of inference rather than direct proof – even after the change in the burden of proof, it is still for a claimant to establish matters from which the presence of discrimination could be inferred, before any burden passes to his or her employer.

4.93. In drawing inferences, an uncritical belief in credibility is insufficient' as Sedley LJ pointed out in *Anya v University of Oxford 2001 IRLR 377 CA (paragraph 25)* it may be very difficult to say whether a witness is telling the truth or not. Where there is a conflict of evidence, reference to the objective facts and documents, to the likely

motives of a witness and the overall probabilities can give a court very great assistance in ascertaining the truth.

4.94. In *Talbot v Costain Oil, Gas and Process Ltd and ors 2017 ICR D11, EAT*, His Honour Judge Shanks — having looked at the relevant authorities — summarised the following principles for employment tribunals to consider when deciding what inferences of discrimination may be drawn:

- it is very unusual to find direct evidence of discrimination
- normally an employment tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question
- it is essential that the tribunal makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances
- the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference
- assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities
- where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations
- the tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment
- if it is necessary to resort to the burden of proof in this context, S.136 EA 2010 provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.

4.95. Unreasonable conduct or poor management does not of itself point to discrimination. There must be indications from the evidence that point to the unreasonable conduct relating to the prohibited ground *(Laing v Manchester City Council and anor 2006 ICR 1519, EAT).*

4.96. In *Glasgow City Council v Zafar 1998 ICR 120, HL*, Lord Browne-Wilkinson considered that 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer, he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' His Lordship also approved the words of Lord Morison, who delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'.

4.97. Equally, it cannot be simply inferred that the fact that an employer has acted unreasonably towards one employee means it would have acted the same way towards others. A failure to explain unreasonable conduct by the employer can support an inference of discrimination. If an employer acts in a wholly unreasonable way, it may be inferred that the explanation offered is not the true or full explanation *(Rice v McEvoy 2011 NICA 9 NICA).* In all cases, the drawing of inferences involves careful consideration of the surrounding facts:.

> "Facts will frequently explain, at least in part, why someone has acted as they have" (Elias P in Laing (above).

4.98. However,

> 'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.' Simler P, *Chief Constable of Kent Constabulary v Bowler EAT 0214/16*

4.99. As stated by the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*, an unjustified sense of grievance does not point to less favourable treatment.

4.100. Where a case consists of several allegations, the Tribunal must consider each separately to determine whether less favourable treatment occurred by comparison with others, so as to shift the burden of proof, rather than taking a broad-brush approach in respect of all the allegations *(Essex County Council v Jarrett EAT 0045/15).*

Time Limits

4.101. Section 123 of the EA 2010 sets out the period within which proceedings are to be brought.

4.102. Proceedings on a complaint within section 120 may not be brought after the end of:

(a) the period of 3 months starting with the date of the act to which the complaint relates or
b) such other period as the employment tribunal thinks just and equitable.

That means that a claim must be presented before the end of the three-month period beginning when the act complained of was done.

4.103. By section 123(3),

" For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

4.104. By section 123(4)

"In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

4.105. In *Hendricks v Metropolitan Police Commissioner [2002) EWCA Civ 1686,* in particular paragraphs 51 and 52, continuing acts are explored, concluding simply,

"The question is whether there is an act extending over a period as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed."

4.106. The question is whether the employer is responsible for "an ongoing situation or continuing state of affairs" in which the members of the defined group are treated less favourably. It is wrong to pay close attention to words such as 'policy', 'rule', 'practice', 'scheme' or 'regime', as these are but examples of when an act extends over a period.

4.107. In *Hale v Brighton and Sussex University Hospitals NHS Trust (EAT 0342/16),* it was held that a decision to commence a disciplinary investigation was not to be treated as a one off act where it led to disciplinary procedures and ultimately dismissal. A relevant but not conclusive factor is whether the same or different individuals were involved in the incidents.

4.108. However, citing Hendricks, Choudhary P in *South Western Ambulance NHS Foundation Trust v King [2020] IRLR 168* warned '… that reliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time. The claimant must still establish constituent acts of discrimination or instances of less favourable treatment that evidence that discriminatory state of affairs.' (at [36])

4.109. The time limits for bringing claims are extended by section 140B of the Equality Act to facilitate conciliation before the institution of proceedings.

4.110. Section 140B sets out that extension, as follows.

> "In this section—
>
> (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
>
> (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
>
> (3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.
>
> (4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

4.111. The day on which the claimant complies with the requirement to provide information to ACAS is ("Day A"). The period between the day after Day A and ending with the day on which the claimant receives or is treated as having received the conciliation officer's certificate ("Day B") is not counted in computing time for the purposes of time limits.

4.112. Once early conciliation has ended, the claimant has at least one calendar month to present the claim. “One month” means on the 'corresponding date' so where day B is 30 June, the time limit will expire on 30 July *(Tanveer v East London Bus & Coach Co Ltd [2016]*.

4.113. If a time limit would otherwise expire during the period, beginning with Day A and ending one month after Day B, the time limit expires one month after Day B, on the corresponding day.

4.114. If the time limit would otherwise expire after the period of one month after day B, then time is extended by a period equivalent to the early conciliation period – that is, the period from the day after Day A and ending with Day B.

5. **Reasons**

Hearing

5.1. The hearing was conducted by Cloud Video Platform, with the consent of the parties. That was due to the pandemic; an in-person hearing was not practicable and there was a high risk of substantial delay if a remote hearing was not carried out. It also accommodated Ms Moorcroft’s continuing health difficulties better.

5.2. The hearing was listed for four days, not to include remedy. In fact, in part given preliminary difficulties over disclosure by the Respondent and the extensive list of issues, which had not been agreed, the time allocation was insufficient, deliberations were deferred and this written Judgment with Reasons issued.

Disclosure

5.3. On 21/04/21, Mr Burgess, from Peninsula, wrote to Mr Henman to say that a copy of the disciplinary outcome and appeal outcome for the other nurse subject to disciplinary proceedings in relation to the incident in December 2018 were not relevant and would not be disclosed. At the hearing, Mr Williams said they had been sought but not found but then adopted Mr Burgess’ answer. An order for disclosure was made.

5.4. The investigation and treatment of the other nurse was directly relevant. The other nurse was a comparator in the disability claim. These were the two employed nurses. Both nurses were investigated and disciplined at the same time in respect of the same series of medication and recording errors, and the treatment of Ms Moorcroft had been reviewed after the other nurse’s successful appeal. The disclosure included document 798 which shows the extent of the other nurse’s admissions of wrongly administering medication over several days. Disclosure should not have been refused.

5.5. There was a substantial flood of additional documents on the second day in response to that order and with the parties' assistance, those the Tribunal needed to see were narrowed down.

5.6. On the second day of the hearing, the panel raised the fact that the documents omitted the doctor's report commissioned on 20/11/17 (304). That would appear to be an important document, commissioned in order to inform the respondent about the claimant's return to work and with a view to addressing reasonable adjustments. Mr Williams sought impromptu to persuade the panel that the report had been the med 3 dated 18/12/17 but a report and a med 3 are different things. Helpfully, Ms Fehilly was in touch with the surgery after the hearing ended for the day and carried out further searches, establishing that there was no evidence that the prepayment invoice had been paid and no copy of any report at this date existed. The inference is that the payment was overlooked and the report was not obtained.

List of issues

5.7. By the Case Management Order of 11/05/20, the parties were to agree a list of issues. The list was not agreed. Mr Williams had raised objections to a few of the proposed issues. Mr Henman, understandably, had not fully understood the complexities of defining issues. The list of issues had to be addressed at the start of the hearing. Some of Mr Williams objections were then withdrawn. The loss of time involved in that process and addressing the problem of disclosure was the first morning.

5.8. It was clarified that disability was not at issue, only the question of the Respondent's knowledge of disability other than cancer. The Respondent conceded that the Claimant was disabled by reason of her former cancer, and by reason of anxiety and depression, at all material times.

5.9. References at paragraphs (a) and (f) in the original list of issues, in relation to direct discrimination, were removed on the basis that they were not based on the ET1 (nor did they describe actions by the Respondent), with (a) reworded to address the manner in which the investigation meeting was conducted. Those changes were also made to the list under section 15, Discrimination arising from Disabilty.

5.10. Mr Henman struggled to understand the meaning of the reference to "something arising from disability", and that is very understandable. The Employment Judge guided him to withdraw the words "and furthermore that the Respondent must protect Claimant and the staff at Boldings Lodge by returning her to a different care home" given that they did not reflect "something arising from disability". That left her sickness absence as the "something arising". Later in the hearing, at the initiative of the panel and with Mr Williams consent, the following words were added "and her unwillingness to move to a different care home" That meant that the "something arising" was both the absence and the reluctance to be moved from her familiar and local place of work.

5.11. Again, Mr Henman had not understood the test in indirect discrimination in relation to what is known as group disadvantage, and again, no criticism is made. These are difficult and often unfamiliar concepts to non-lawyers. The test had been correctly set out but the way in which group of persons with whom the claimant shares the protected characteristic was alleged to be put at a disadvantage was set out as,

> "a The neutral circumstance which creates this situation is the Respondent transferring at will workers between care home facilities they control"

5.12. Having explored what was seen as factually at issue here, the wording was changed with the consent of the parties to "having difficulty coping with change and in particular transfer from familiar place of work."

5.13. The third PCP relied on was the provision in the sickness absence policy where,

> "The organisation may first consider redeploying the employee with his or her agreement to another available job at the same or lower grade which is more suited to his or her abilities."

5.14. It was not the pleaded case that this had been applied – this was a disciplinary transfer and it had not been with the claimant's consent. After discussion, including as to how any group disadvantage would be addressed, Mr Henman agreed to withdraw it.

5.15. The specific disavantage complained of in relation to reasonable adjustments was added to the wording in relation to the issues arising under section, as,

> "By reason of her disability, the claimant has difficulty in coping with change and that has effects on her health.

5.16. In relation to harassment, an additional paragraph was inserted to fully reflect the statutory requirements,

> "Did it relate to the Claimant's protected characteristic, namely disability?"

5.17. Given the extent of the changes and for the avoidance of doubt, Mr Henman kindly provided a Word copy of his list of issues, and the amendments made were added by the Employment Judge and circulated at the start of the fourth day of the hearing. There was no objection to the final wording. The Judge had put the allegations in date order, and that did make reference more difficult during submissions; it was however wholly necessary for the proper consideration of the claims made.

Analysis and discussion by reference to Issues

5.18. The issues have been taken out of order because that accommodated the deliberations better. Remedy was not due to be addressed at this hearing.

Constructive Unfair Dismissal- s.95 Employment Rights Act 1996

5.19. While there is a long list of events relied on in relation to the constructive dismissal claim, it is helpful to take an overview, and, in summary, the events relied on are these. The Roman numerals refer to the list of issues above, but the order has been rearranged to be closer to date order.

- Suspending Ms Moorcroft for a fortnight in August 2018 (i)
- The failure of the investigation in 2018 (ii)
- Circulating witness statements to her that breached other people's confidentiality (February 2019) (xi)
- Dismissively discussing the removal of her PIN number (February 2019) (v)
- Demoting her (22/02/19) (vi)
- Failing to investigate the Grievance (16/05/19) (iii) and (iv)
- Misdescribing the sickness review meetings and introducing a threat of dismissal if still absent on 8/07/19 (5/06/19) (vii) and (viii)
- Transferring her to The Laurels (26/06/19), and so removing the reasonable adjustment that she work at Boldings (ix) and (x)

5.20. The resignation was written on 07/07/19 and read on 08/07/19.

5.21. Our findings on the factual matters relied on in relation to Constructive Dismissal are these.

Suspending the Claimant for more than two weeks counter to the guidance in the Respondents disciplinary policy (i)

5.22. This is the August 2018 suspension, see paragraphs 3.24 onwards above. The suspension was within the policy and a reasonable step in circumstances where the Respondent understood there to have been a serious failure of care, as judged by the handwritten record of observations. It was not untoward.

Failing to conduct a full and proper investigation in a disciplinary process resulting in omitting information that should have been provided to the Claimant (ii)

5.23. The investigation was plainly inadequate for the simple reason that the statutory nursing log was not considered. That is a puzzling omission. The Respondent was not entitled to conduct a disciplinary based on failure to maintain the required records without consulting the actual records. It is not clear why the error was not noticed, in particular, given Ms Moorcroft's recorded account, either at the investigation stage or the disciplinary stage.

5.24. Ms Moorcroft did not appeal or challenge the outcome until much later. She reports being misled by the investigating officer in telling her that this was not a serious matter, but when she realised how seriously it was regarded, she could have appealed. She chose to put up with what she saw, and continues to see, as unfair

and a miscarriage of justice. While she remained unhappy at the course of events, she did not take action, she accepted what had happened for a number of months.

5.25. Ms Moorcroft did not challenge the outcome of this first disciplinary until the Grievance on 16/05/19 – by which time she had the evidence that she should have had throughout.

The Respondent breaching the organisation's own policies and procedures in relation to matters concerning disclosure and confidentiality and therefore breaching Data Protection legislation (xi)

5.26. This relates to the circulation with the Investigation Report of witness statements written by other nurses or staff members and containing allegations against other nurses, in particular, the other employed nurse. That was in February 2019. It was not Ms Moorcroft's confidential information that was shared. It was in her interests to see these witness statements, the more so given that they do not contain any allegations against her. This is not a breach of her contract or of the implied term in it of trust and confidence.

Dismissively discussing the removal of the Claimant's pin number (v)

5.27. This is the allegation by Ms Moorcroft that during the meeting of 9/04/19, a sickness review meeting, the former director of HR had made an "inappropriate comment" about the loss of her PIN – that is the registration number confirming her qualification to work as a registered nurse. The allegation is made in the grievance of 16/05/19. There is no record of such a comment in the notes of the meeting (546), which is hardly surprising, but the alleged comment has not been clearly spelled out anywhere. We understand it to be a threat that Ms Moorcroft would lose her PIN. If so, it goes with the decision to report her to the NMC, something that was left hanging over her for many months but never carried out.

5.28. On the evidence we have, there was no breach of contract in the comment made. We accept that some such comment added to her growing sense of injustice.

5.29. She is right to point out in the Grievance that only the NMC could remove her PIN and then only after due process.

Unilaterally changing the Claimant's contractual job function and salary without the Claimant's consent whilst knowing that the Claimant will still have to fulfil her legal duties of care as a registered nurse; (vi)

We take this with the other part of item (v) "*… and changing the Claimant's role and duties while registered as nurse";*

5.30. This is a reference to the decision to demote her after the second disciplinary. The disciplinary took place on 22/02/19 and was confirmed on appeal on 27/03/19.

5.31. It has been part of Ms Moorcroft's challenge to that decision that, even leaving aside what she says as to the unfairness of the sanction, it placed her in a difficult position, one of potential conflict. She would still be bound by the duties and responsibilities of her profession as a Registered Nurse, while working as a carer in a situation of understaffing. The very errors that had led to this disciplinary would not have inspired confidence in her that this was sustainable. The allegations of bullying in the witness statements are equally challenging to someone who faced working in that environment in a subordinate role. The potential for that being a situation of personal conflict is acknowledged in the findings on appeal of the other nurse (802).

5.32. The Respondent was entitled to propose an alternative to dismissal. However, the potential for difficulties for a Registered Nurse in the demoted role of care assistant should have been identified and addressed before committing to that course.

5.33. The greater difficulty for the Respondent is that the finding of gross misconduct entitling them to dismiss is based on the findings of two disciplinary processes, both of which in our judgment were deeply flawed.

5.34. In relation to the first disciplinary, it was a fundamental error to find misconduct in recording without looking at the actual records in the statutory nursing log. While Mrs Moorcroft accepted that without complaint at the time, she did later obtain the evidence to challenge it, so it became a live issue for her again, the mores so after the refusal to investigate her Grievance of 16/05/19.

5.35. In relation to the second disciplinary, any employer of nursing staff is entitled to take failures of recording seriously. But other nurses, including the other employed nurse, also made recording errors, similar to or worse than Ms Moorcroft's. They were also found to have actually administered the wrong medication, and to have omitted to procure or administer necessary medication. There are allegations, uninvestigated, of bullying behaviour directed at concealing medication errors, and evidence of a wrongful alteration of the required dose, raised by Ms Moorcroft on appeal, but also uninvestigated.

5.36. The errors of recording that Ms Moorcroft made should not have led to any errors in the administration of medication, if the other nurses had fulfilled their duty to check the discharge record and dosage information. That that was their duty is stated repeatedly.

5.37. The allegation that she caused an overdose of antibiotics must be wrong: it is plain from the discharge summary that the number of capsules prescribed was only enough to finish each course of the two antibiotics. There must have been a failure to administer the doses in accordance with the instructions if there were capsules left after 20/12/19. That was not Mrs Moorcroft's doing or her fault.

5.38. It is hard to see why Ms Moorcroft's errors are treated as on a par with the same or worse errors of recording by the other employed nurse, when that nurse's direct and admitted involvement in administering medication wrongly, involving three different medications, was disregarded. There has been an assumption that the culpability of the two employed nurses was directly equivalent and no reasonable employer would regard it in that light.

5.39. The submission made that Ms Moorcroft was not actually demoted because she did not actually attend work as a care assistant is not helpful. It is very plain that there was a decision to demote her and a refusal to reconsider that. She was not allowed to return to work as a nurse. Had she attended work, it would have been as a care assistant, until that decision was revised.

5.40. These decisions are well before Mrs Moorcroft's resignation but they are part of the course of events, and a course of conduct by the Respondent, that led to that resignation.

Failing to take the Claimant's grievance letter of 16th May 2019 seriously (iii); and Failing to follow the Respondent's grievance policy to investigate the Claimant's grievance; 23/05/19 (iv)

5.41. This is a reference to the Grievance and to Ms Jones' response of 23/05/19 (551, paragraphs 3.108 on, above).

5.42. The Grievance includes a complaint about a remark made by Mrs Bryce, the former Director of HR about Ms Moorcroft's PIN.

5.43. There was a refusal to consider this. There was no justification for refusing to consider a Grievance simply because the person concerned had left the business. It was capable of being considered and should have been. This was not a complaint about the disciplinary action taken against Ms Moorcroft. It was not something that the Grievance Policy required to be dealt with under the Disciplinary Policy.

5.44. More importantly, the refusal to consider the balance of the Grievance was misconceived.

5.45. The Grievance challenged the outcome of the two disciplinaries.

5.46. We accept that the Disciplinary Policy is intended to be final with regard to disciplinary matters and we accept that in respect of both disciplinaries, the procedures had been completed. The Policy expressly says that any complaint about any disciplinary action should be dealt with as an appeal under the disciplinary procedure (216).

5.47. In our judgment, if there is clear evidence of a miscarriage of justice, no reasonable employer would simply reject a request to review. It is outside the policy, and the policy is intended to be final. But the findings here, for a Registered Nurse, had been potentially career-ending. That was the point of the proposed referral to the NMC. If there was a clear possibility of serious error, a review should have been carried out.

5.48. With regard to the first disciplinary, Mrs Moorcroft shows in the Grievance that if the evidence of the statutory nursing log had been considered, she would not have been found to have neglected someone with oxygen levels well below the expected range. She does that by producing the original evidence, that should have been and had not been seen at the time. That is a ground on which the Respondent should have been willing to look again at what had happened.

5.49. She sets out too the way that in the second disciplinary, there had been a failure to identify her role in the medication errors that were made; that she could not have caused an overdose of antibiotics and that there had been confusion as between her role and that of other nurses. Again, she produces fresh evidence, matching her recording to the discharge summary.

5.50. These are serious enough allegations, presented with the relevant evidence to support them, to show that a miscarriage of justice had occurred.

5.51. Even if the Respondent took the view that it was not open to them to reconsider the disciplinary process, there had been that recommendation for a report to the NMC. That had not been done. It was still proposed (560, para 3.131 above). It was on the "to do" list. It was wrong to propose to make such a report without considering this evidence. It was wrong to refuse to consider it.

5.52. This was a breach of trust and confidence on the part of the Respondent and part of the course of conduct that led to Ms Moorcroft's resignation.

The Respondent's HR Department continuously breaching the Sickness and Absence policy when corresponding with the Claimant by misdescribing the purpose of the meetings and not offering to have any representation to attend or alternatively not correctly describing what representative could attend. (vii)
Threatening the Claimant in a meeting that procedures would be started to dismiss her if she did not return to work by 8th July 2019 (viii)

5.53. Ms Moorcroft was invited to attend a wellbeing meeting on 30/05/19. That was appropriate, for planning a return to work and considering reasonable adjustments. There was no mention in the letter of a time scale, and it was not a threatening process. It was a reasonable step to facilitate a return to work.

5.54. The meeting itself is noted as being a Wellness meeting.

5.55. The letter following it, drafted by Ms Jones as Director of HR although she had not conducted the meeting was headed Occupational Health Assessment Review Meeting (Stage 2). It was written on 5/06/19. It contained a warning that if she did not return to work by 08/07/19, a Stage 3 Sickness Absence Hearing would be arranged.

5.56. That was not said at the meeting. It was introduced in this letter.

5.57. There are no stages in the sickness management policy. They are only in the Capability Policy. It would not be unreasonable to have an absence policy that sets out stages, and that introduces the possibility of dismissal. It was unreasonable and unfair to apply a different policy and to apply it retrospectively. Here the nature of the meeting was changed retrospectively and to include a warning of possibly imminent dismissal. That would have been unfair even if the procedural steps reflected those in the sickness policy, but they do not. She was threatened with Stage 3, with potential dismissal, not having had the first or final warning proposed by the Capability Policy or being told that it was that policy that was being applied.

5.58. The meetings hitherto had been informal, Ms Moorcroft had not been able to have a companion with her, while if the formal process referred to had been followed, she could have had a representative.

Unilaterally relocating the Claimant without agreement or consent to a more distant and unfamiliar care home despite the concerns raised by the Clamant about how this would cause her further stress and such a move was contrary to the medical advice made by the Claimant's doctor and Occupational health (ix)
By the Respondent moving the Claimant to a more distant and unfamiliar care home without consent or agreement thereby breaking the contractually established location of work maintained as a reasonable adjustment for the Claimants cancer disability (x)

5.59. This is the substitution for the demotion of reinstatement to work as a nurse on a supervised basis, but at a different care home, and it took place on 26/06/19.

5.60. There are four elements to this.

- The change in the sanction imposed
- Consultation
- The reasonable adjustments in place
- The reason for the transfer after reinstatement as a nurse

The change in the sanction proposed

5.61. There is an obvious inconsistency in the Respondent refusing to re-open the disciplinary process because it had concluded, and re-opening it of its own initiative, within a month. That confirms our view that it was possible to reconsider the outcome of a concluded disciplinary process to avoid a miscarriage of justice.

5.62. The Respondent must be given credit for seeing the unfairness of maintaining the sanction of demotion against Ms Moorcroft when allowing her colleague reinstatement to the role of a nurse, albeit under supervision.

5.63. The failure is to still to refuse to consider the Grievance with its evidence of a miscarriage of justice. That could have been considered as part of this review of the penalty. The decision not to investigate the Grievance was very recent, just one month earlier, on 23/05/19 (3.122 above).

5.64. Even without re-considering the Grievance, no reasonable employer would reconsider a sanction without reflecting on what the sanction was for. The record of the appeal outcome for the other nurse shows that she had made more errors, and repeated direct errors in the administration of drugs, as well as the errors Ms Moorcroft was found to have made in recording. That should have given them pause to reflect on what the appropriate sanction would be. Instead, there was a continuing, unexamined assumption that the two were equally culpable.

Consultation

5.65. Ms Fehilly commented that normally a transfer, even a disciplinary transfer, would be based on some consultation. There was no consultation. Had there been, the health-related reasons behind Ms Moorcroft's reluctance to move to The Laurels could have been explained.

Reasonable adjustments

5.66. The Respondent agrees that the change to Ms Moorcroft's contract on her return to work after a prolonged absence for cancer treatment represented reasonable adjustments made in respect of her disability. Surprisingly, there is no record of that adjustment being agreed. Ms Moorcroft's account is unchallenged, and we accept that the adjustment made was for two non-consecutive night shifts per week at Boldings. That reflects reduced hours following her long period of illness, a pattern of work that suited her psychologically, enabling her to sleep better and to manage her anxiety and panic attacks, a working environment that was familiar to her, where she could feel confident in her work without have to cope with change, one which involved her in minimal travel in a context where her anxiety had impaired her ability to go out. It also accommodated her caring responsibilities.

5.67. Any change to an adjustment for disability needs to be considered carefully with the individual concerned. The Respondent was not entitled to simply withdraw it, even if they did so unaware of the reasons for it. There should be proper records kept of any adjustment, to safeguard against this very error.

5.68. The Respondent has accepted hat depression and anxiety were disbailities, only contesting that they knew of them. It is very possible that they had direct knowledge from the discussion of the earlier adjustment. In any event, they had failed to obtain the medical evidence they knew to be necessary, and Ms Moorcroft had by the time the proposal to transfer her was made, been off work with mental health impairments for four months. They had constructive knowledge.

5.69. Ms Moorcroft was being presented with a change that was challenging to her in more ways than one. Given her mental health difficulties, travelling further afield was difficult, leaving aside the logistics for her. But also, the proposed care home was shown to have young people with learning disabilities, and with physically challenging behaviour. She did not feel strong enough to cope with that, given the physical and mental history That is not unreasonable. There was no consideration of the genuine difficulties she was raising or of how, if at all, they could be mitigated.

The reason for the transfer after reinstatement as a nurse

5.70. Sadly, the purpose of the transfer away from Boldings was misconceived. Ms Jones says she decided on it because of the witness statements in the investigation leading to the second disciplinary. While Ms Fehilly says that that is only presented as one of the reasons, it is presented as a "key" reason.

5.71. Mrs Jones cannot have read the witness statements. They do not implicate Ms Moorcroft. Nothing in their content would have caused difficulty for Ms Moorcroft in returning to work at Boldings

5.72. There had been no objection to her returning as a care assistant, so it is hard to see why she was not able to return as a nurse, even under supervision.

5.73. Ms Moorcroft's role in all of this comes across as small – she was only there at the end of her shift in the morning of 19/12/19, The medication errors were made from later that day and repeatedly thereafter, up to 24/12/19. The evidence before the employer did not implicate her in those. The errors of recording were made by eleven nurses.

5.74. The witness statements do not afford a reason why Ms Moorcroft could not be reinstated at Boldings. There were other possibilities – she suggested Kingsmead, or there was The Orchard. The Respondent insisted on The Laurels, and had no good reason to do so.

5.75. The insistence on a transfer to The Laurels was ill-founded and unreasonable and a breach of the implied term of Trust and Confidence.

5.76. While we do not know what other reasons had been at play when the original decision to transfer her was made, Ms Jones held to the decision in spite of the request to reconsider by Ms Moorcroft based on her mental health, That was on 26/06/19, a phone call reported to Ms Jones by Ms Rogerson on 27/06/19. There was no reconsideration.

5.77. Eventually, there was the GP letter and the Occupational Health report. The GP letter expresses plain concern about detriment to Ms Moorcroft's mental health (577). While there was a meeting to review Ms Moorcroft's resignation on 17/07/19, there no reference then to those medical reports or any willingness expressed to review the penalty transfer imposed. That was unreasonable in itself but the more so because of the previous agreement that Ms Moorcroft work at Boldings as a reasonable adjustment on her return to work after her cancer treatment

5.78. Applying the law to the facts found, we conclude as follows.

5.79. Following the guidance in Kaur, the most recent act triggering resignation was the insistence on a transfer to The Laurels. That was followed by three omissions. The first was the failure to reconsider or obtain GP evidence when Ms Moorcroft raised the question of her mental health on 27/06/19. The others reflect the failure to reconsider on seeing the Occupational Health report on around 3/07/19 or 4/07/19 and the failure to reconsider on seeing the GP report sent in with her resignation email.

5.80. The insistence on the transfer to The Laurels was a fundamental breach of contract. That was because it disregarded the previous agreement that given her disability, she should be based at Boldings and because of the lack of consultation. It was also based on a misconception about the nature of the evidence against Ms Moorcroft in the witness statements and as she well knew, was based on misconceptions about her culpability because of the flawed investigations and failure to identify precisely her role in the December 2018 errors.

5.81. In addition, the insistence on the move to The Laurels was the culmination of a series of acts when the Respondent's officers had undertaken unfair disciplinary processes and refused to investigate plain miscarriages of justice, in spite of the very serious threat made to her professional status as a nurse. Viewed cumulatively, that was a course of conduct that amounts to a repudiatory breach of trust and confidence. And there we include the failures in respect of the earlier disciplinary, given both that on the authority of Kaur, she is entitled to rely on it, and that there had been a refusal to reconsider that in the light of the new evidence.

5.82. There was no delay or affirmation after the date of the meeting of 26/06/19. Ms Moorcroft remained absent from work on sick leave.

5.83. She resigned in response to that breach, the timing being based on the earlier wrongful threat that she would be subject to Stage 3 and at risk of dismissal if she did not return to work, without any consideration of her sound reasons for being unable to accept the proposed changes to her contract.

5.84. This was a constructive dismissal.

5.85. The Respondent has not shown a potentially fair reason for dismissal. The Respondent relies on "some other substantial reason", namely a breakdown in working relationships, but that is not the reason for their conduct, nor is it the reason for her resignation.

5.86. This was an unfair constructive dismissal.

5.87. The claim is brought in time. The resignation was on Sunday 7/07/19, and effective on Monday 8/07/19. That is because it was sent by email on Sunday and would have come to the attention of the Respondent's staff that Monday morning.

5.88. The ACAS dates are 28/08/19 to 12/10/19.

5.89. The time limit would have expired on 7/10/19 without the early conciliation extension. That date is during the conciliation period so time is automatically extended by at least one month and in this case by 44 days.

5.90. The claim was made on 10/11/19.

5.91. It was in time.

Wrongful Dismissal

5.92. It follows from our reasoning on constructive dismissal that the Claimant was entitled to notice pay from the Respondent. That was not challenged by the Respondent.

Disability

5.93. The conditions relied upon by the Claimant are:

(i) Breast cancer;

(ii) Anxiety; and

(iii) Depression.

5.94. The Respondent accepts that the Claimant's condition of Breast Cancer satisfies the definition of a disability in accordance with Section 6 Equality Act 2010. The Respondent accepts that she was disabled by reason of anxiety and depression but does not accept that it or its officers were aware of that.

5.95. The medical evidence we have seen does not show a diagnosis of anxiety at the material times. We do however accept, as does the Respondent, that there are mental health implications associated with cancer and the period of recovery from cancer with the residual risk of recurrence. Ms Moorcroft in her impact statement gives detailed evidence about anxiety and panic attacks and the medication prescribed for them, from 2011 onwards. She has since been identified as suffering work-related stress, which itself points to a condition of anxiety. We accept the Respondent's concession as appropriately made.

Knowledge

5.96. The issues raised are:

> *In respect of conditions that would amount to a disability did the Respondent make reasonably efforts to determine if the Claimant was a disabled person?*
>
> *In respect of any conditions that amount to a disability, can the Respondent show that it did not know and could not reasonably have been expected to have known that the Claimant was a disabled person?*

5.97. The Respondent knew of her cancer and planned her return to work after a long absence for treatment.

5.98. The Respondent decided to obtain a medical report when the Claimant was due to return after her absence for cancer treatment. The request for that report is written in general terms (304). There was no specific request limiting its scope to the recent illness. The questions include,

> "Will there be any ongoing disability (at the date of return to work)?
> How long is it likely to last?
> Will it be temporary or permanent?
> Is she likely to be able to render regular and efficient service in the future?"

5.99. It was an appropriate request.

5.100. The Respondent did not obtain the report because the fee was not paid. It was reasonable to request the report and it was not reasonable then to fail to pay the fee for it. That was an error that was not picked up.

5.101. The questions raised were appropriate. They were not limited to physical wellbeing. They were such as to prompt a report of psychological consequences to the stress of a life-threatening illness, and in this case, a report of the pre-existing diagnosed mental health conditions. Although Ms Moorcroft was planning a return to work, she

still faced reconstructive surgery and continuing medication for a range of conditions about which it was appropriate that the Respondent was informed.

5.102. We do not infer that if the report had been obtained it would have been limited to the recovery from cancer. That is because nothing in the request limits it in that way. We have a later report from Ms Moorcroft's GP which, while only one page, covers her diagnosed conditions back to 1999, date of diagnosis and ongoing medication and treatment. It is likely in our judgment that a broadly directed request would have produced a similarly broadly drawn response, in particular because of the significance to Ms Moorcroft's abilities of her mental health difficulties and vulnerabilities.

5.103. Ms Moorcroft's mental health and psychological wellbeing was an active concern to her at the time, as demonstrated by her wish to remain working at Boldings, a familiar and nearby environment.

5.104. It is reasonable to infer that if the Respondent had paid for the report, it would have had direct information about Ms Moorcroft's mental health. They recognised the need for that information.

5.105. In any event, the Respondent was aware of the Claimant's disability of cancer, and they knew of the scope for anxiety in relation to that and the need to promote her psychological well being including from the occupational health report.

5.106. They had made adjustments in respect of her disability. There were discussions at the time of her return to work. They resulted in the reduced hours to two non-consecutive night shifts in place of the previous 36 hour contract and that she be based at Boldings. They were more than temporary adjustments – there was also a phased return to work. They were or should have been on notice of the reasons for her seeking to manage her physical and mental health by working locally, in a familiar setting and on reduced hours.

5.107. The adjustments were made to facilitate Ms Moorcroft's return to work after her long absence, and to help reduce her background levels of stress and anxiety – that is her unchallenged evidence.

5.108. It is likely that at the time, in those discussions, they had direct information about her anxiety and her difficulties in coping with change and getting out and about, but we do not rely simply on that.

5.109. They also had the Occupational Health report, which without recording a history of mental health conditions, included evidence of the need for care for her psychological well-being.

5.110. By June 2019, she had had a prolonged absence with work-related stress.

5.111. By 27 June, when she rang to say she and her doctor had discussed the transfer, there was an ample basis to seek a GP medical report.

5.112. The Occupational Health report of 3/07/19 included a clear account of symptoms of reduced mental health.

5.113. The writer does not identify disability by reason of mental health, and attributes the problems to "employee relations matters" rather than occupational health matters.

5.114. In our judgment, the Respondent's officers were not entitled to rely on that as evidence that there were no mental health concerns to enquire into, given the account of symptoms - the history of the medical certificates and lengthy absence and the comments reported from the GP. The symptoms described include,

> "poor sleep and concentration, low mood, over-eating and skin problems. In other words she remains subject to reduced levels of psychological wellbeing which she attributes to the situation at work."

5.115. By 8/07/19, they had a GP report specifically expressing concern about her proposed transfer to The Laurels, in the context of her detriment to her mental health. At that point, they had clear and immediate knowledge of the mental health condition. They did not act on it. They did not enquire further. They did not review the decisions that were impacting her.

5.116. In summary, if proper enquiry had been made, the extent of her mental impairments would have been known from 2017: that she had a history of depression with anxiety, as well as her later history of work-related stress. Those conditions are conceded by the Respondent as a disability. They had actual knowledge from the discussion of the reasonable adjustments in 2018, although we don't know the extent of that discussion. She was absent with work-related stress from the end of February. They were expressly prompted to but failed to enquire again in June 2019 and July 2019.

5.117. They had actual knowledge of the cancer and her status as a disabled person. They had at the very least constructive knowledge of her mental health impairments throughout the material period and actual knowledge of them by July at the latest.

5.118. Did the employer respond appropriately to the Claimant with a known disability when she asked for reasonable adjustments to be made that were practical and affordable to accommodate? We deal with this below.

Discrimination arising from disability- s.15 Equality Act 2010

5.119. The unfavourable treatment relied on is set out at items (a) to (u) in the List of Issues.

5.120. While we address the issues as drawn, it is helpful to have an overview, here again departing from the order in the list of issues to achieve date order:

- The manner in which the investigation meeting of 24/09/18 was conducted (a)
- Breaching staff confidentiality in circulating witness statements about other people (o) (February 2019);
- The invitation on 4/04/19 to a sickness review meeting (b);
- The invitation on 23/05/19 to a wellbeing meeting, and as rescheduled (c) and (d);
- The letter of 5/06/19 setting out a risk of dismissal based on stage 3 absence, incorrectly summarising the meeting of 30/05/19 (e), (f), (g);

- Transferring her to The Laurels on 26/06/19 and thereby ending a reasonable adjustment (h) and (i);
- Disregarding her request for review based on her mental health after discussion with her doctor (27/06/19) (j), (k), (l);
- Disregarding the GP letter and the Occupational Health report (8/07/19 and 3/07/19) (m) and (n);
- Ms Jones relying on the witness statements on 24/07/19 as a reason for not letting Ms Moorcroft return to Boldings (p) and (q);
- Refusing on 09/08/19 to investigate any part of the Grievance previously raised (r);
- Accepting the Claimant's resignation (so refusing to investigate the Grievance) (s);
- All the matters leading to the resignation (dismissal) (u);

5.121. The last item relied on here is the dismissal of the Claimant. That requires unpacking. The dismissal was a constructive dismissal founded on a series of actions we have found to amount to breaches of the implied contract term of trust and confidence. Those actions are fairly summarised in the list above without adding them as a final item.

5.122. We recognise that Mr Henman had difficulty in framing the issues. His original proposal as to the "something arising" was;

> ".. the unfavourable treatment because of the Claimant's previous disability of cancer, being off work for depression and anxiety for 5 months and furthermore that the Respondent must protect Claimant and the staff at Boldings Lodge by returning her to a different care home?"

5.123. The issues were redrawn at the start of the hearing, to

> "Was the unfavourable treatment because of something arising from the Claimant's disability, namely being off work for 5 months?"

5.124. Later in the hearing, the panel proposed the addition of "and her unwillingness to move to a different care home" on the basis that that was consistent with other complaints and picked up the issue of the transfer. There was no objection to that.

5.125. Both of those focus on the absence in 2019 and on the proposed move to The Laurels, which was decided on in June 2019, as did Mr Henman's version.

5.126. Nothing that happened before those things can therefore be caused by them. On that basis, (a) and (b) in this list of issues, events in August 2018 and February 2019, are not instances of something arising out the disability. That is,

> The manner in which the investigation meeting on 24/08/2018 was conducted (a)

and

The Respondent breaching staff confidentiality and data protection in respect to six witness statements that had been sent to the Claimant which were related to another individual's disciplinary (0)

5.127. We continue by addressing the questions that arise in considering a section 15 claim, in respect of the remaining issues listed. Were these unfavourable treatment and, if so, were they because of the absence?

5.128. While the invitation to a sickness review meeting or a wellbeing meeting was a response to her absence, items (b) to (d), we do not see this as treating the claimant unfavourably. The Respondent has to manage sickness absence and these were appropriate steps to take.

5.129. We take a different view in respect of items (e), (f) (g)

(e) The Respondent sending a letter to the Claimant dated 05/06/2019 that threatened the Claimant with a stage 3 Sickness Absence Hearing if the Claimant did not return to her work duties by Monday 8 July 2019 with a possible outcome being the termination of employment on the grounds of capability.

(f) The Respondent in the same letter sent to the Claimant dated 05/06/2019 concluding the letter with 'we look forward to you returning to work on Monday 8 July 2019' thereby continuing the implied capability threat against the Claimant.

(g) The Respondent in the same letter sent to the Claimant dated 05/06/2019 concluding the letter with 'we look forward to you returning to work on Monday 8 July 2019' thereby continuing the implied capability threat against the Claimant irrespective of her medical condition.

5.130. As set out above, this email changed the nature of the meeting already conducted to a stage 2 meeting, and including a warning about moving to stage 3 based on a policy not previously referred to. The Claimant was not aware of it. That is unfair. There was a sudden, unannounced change in tone and a retrospective change in the process, with a threat of prospectively imminent dismissal. The first two stages in the policy had not been properly applied to her. However reasonable that policy may be for managing long-term sickness absence in the context of capability, this is not a reasonable or appropriate application of it.

5.131. While signed by the HR officer who had conducted the meeting, it was drafted by the then Director of HR, taking a new and tougher line, very different from the tone of the invitation to the meeting or the conduct of it. Ms Moorcroft was off work with stress and this treatment was upsetting, foreseeably so. (The reference to showing

her round Orchard Lodge did not help, given that the proposal she resisted was to go to The Laurels.)

5.132. This was unfavourable treatment.

5.133. It was because of the Claimant's absence. There is that clear and direct connection.

5.134. The next two items are:

> (h) The Respondent removing a reasonable adjustment previously made for the Claimant's disability in a meeting on 26/06/2019, by relocating the Claimant to a different and more distant care home, and
> (i) In a meeting on 26/06/2019, the Respondent removing a reasonable adjustment previously made for the Claimant's disability in relation to her working 24 hours per week over two 12-hour night shifts.

5.135. Ms Moorcroft has given us an account of the original reasonable adjustment. In settling on the disciplinary transfer, the Respondent removed the agreed reasonable adjustment for disability. It was wrong to do that. It was unfavourable treatment.

5.136. Why did that happen? It was the then Director of HR, Ms Jones, who made the decision. She had not been in post at the time of Ms Moorcroft's return to work and the Respondent kept no proper record of the adjustment granted.

5.137. We remind ourselves that the "something arising from disability" has been stated to be

> "being off work for 5 months and her unwillingness to move to a different care home"

5.138. Was Ms Moorcroft's absence an effective cause of this decision? It is hard to see a basis on which that is the case. In terms of what was influencing the mind of the decision-maker, we infer that it was a determination to pursue the disciplinary process then (wrongly) seen as fair, and to override objections seen as a refusal to submit to an appropriate penalty. The review of the penalty itself was seen as, and in principle was, a fair response to the change in treatment of the other nurse. The absence was not the reason for the treatment.

5.139. Was it because of Ms Moorcroft's unwillingness to move to a different care home? It could not have been. That reluctance was only an issue once the decision was made to move her. We have no evidence to suggest that Ms Jones in any way anticipated this being a difficult move for other reasons than that it arose from a disciplinary procedure.

5.140. This was not because of something arising from Ms Moorcroft's disability.

5.141. The next three items relied on are:

(j) The Respondent ignoring a telephone notification by the Claimant on 27/06/2019 that her doctor was concerned about her change of location and this might be detrimental to the Claimant's health.

(k) The Respondent ignoring a telephone request by the Claimant on 27/06/2019 that she wanted to remain at Boldings Lodge as she had happily worked there for 10 years.

(l) The Respondent on 27/06/2019 ignoring a telephone request made by the Claimant to consider an alternative move to Kingsmead Lodge as she car shares with her daughter and it is closer to home.

5.142. We know that the HR officer handling the case day to day consulted the Director of HR about the possibility of a move to a different location, though we have not seen the reasons why that was not pursued, nor was Ms Moorcroft told about it. But there was no shift away from the proposal to transfer Ms Moorcroft to The Laurels.

5.143. There was presumably a decision not to seek medical evidence to clarify the GP's advice or to accept the information given by Ms Moorcroft over the telephone that the proposed move was seen as potentially detrimental to her health. If not a decision not to seek medical advice, there was a failure to consider that as an appropriate step before confirming the proposal to transfer her to The Laurels.

5.144. It is clear that that course was adopted by Mrs Jones – she was consulted for guidance by the HR officer.

5.145. Why did this happen?. Again, this by inference was based on a view that the penalty imposed on Ms Moorcroft was appropriate and her objections were unreasonable.

5.146. We remind ourselves that the "something arising from disability" has been stated to be

> "being off work for 5 months and her unwillingness to move to a different care home"

5.147. Again, the evidence does not point to the absence being an effective cause, or influencing Ms Jones' thinking on this. This is part of her approach to the disciplinary proceedings, not part of the way that the absence was being managed.

5.148. Why would Ms Jones decide against obtaining medical advice or relying on Ms Moorcroft's report of the GP's concern? It might have been because there was an Occupational Health consultation due shortly, something referred to at the meeting. It might in the alternative be that she thought the transfer an entirely appropriate move, helpful to Ms Moorcroft in that the demotion was lifted and fair: in other words, that Ms Moorcroft's unwillingness to submit to the transfer was unreasonable.

5.149. We revert to this later.

5.150. The Occupational Health report was obtained dated 3/07/19. We infer it was emailed the same day or perhaps the next day.

5.151. A GP letter dated 01/07/19 confirming concern about Ms Moorcroft's mental health if transferred was supplied with her resignation letter.

5.152. Both medical reports commented on the stress she experienced at the prospect of a move.

5.153. There was no failure to consider the GP letter before the resignation because that is when it was sent in. It was not unreasonable not to have acted on the Occupational Health report in the two or three working days that they had it.

5.154. Ms Moorcroft resigned on 07/07/19. The GP's advice was noted (579). The HR officer consulted the Head of HR expressly about it.

5.155. Ms Moorcroft was then invited to a meeting on 17/07/19 to discuss her resignation. That was an opportunity to address the advice given. It was not discussed and the notes of the meeting show no discussion of any alternative to the transfer to The Laurels. There had been a decision not to act on the basis of the GP advice or the reference to stress in the Occupational Health report.

5.156. This is the basis for the next two instances of unfavourable treatment relied on:

> (m) The Respondent disregarding a doctor's letter dated 01/07/2019 regarding concerns about the change of location and the same being detrimental to the Claimant's health.
>
> (n) The Respondent disregarding the recommendations and guidance from occupational health dated 03/07/2019 and failing to take onboard concerns about the Claimant's change of location and this might be detrimental to the Claimant's health.

5.157. There is no obvious explanation for the Respondent's refusal to act on or discuss with Ms Moorcroft the advice given by the GP and the reference to stress in the Occupational Health report. They were aware of both and had had time to consider them. There had been internal discussions. (578/9). It was unreasonable to disregard that advice. That was unfavourable treatment.

5.158. The question is whether the things identified as "something arising" from Ms Moorcroft's disability were the reason for it that treatment, that is, an effective cause of it.

5.159. The "something arising" from disability was, we remind ourselves, cast in the following terms:

> "Was the unfavourable treatment because of something arising from the Claimant's disability namely being off work for 5 months and her unwillingness to move to a different care home

5.160. What we see is resistance to any diversion from the chosen course, even where the employee had been able to elicit the support of her GP. That fits with the fact that the employer's officers were acting in ignorance or disregard of the previously agreed reasonable adjustments for disability. That, presumably, was because there was no

proper record of them but also because the transfer had been settled upon on a disciplinary basis, and without consultation with Ms Moorcroft. In our judgment, it reflects the view taken of the gross misconduct of which she had been found guilty. Her case that there had been a miscarriage of justice had been dismissed, and she was seen as simply raising barriers to a justified disciplinary action.

5.161. What the decision amounts to is a resolution to hold to the proposed disciplinary sanction. It reflects the intention to be firm in the face of her opposition. In that sense, it was caused by her reluctance to be transferred; that was seen as ill-founded.

5.162. If we now look back at the pattern since Ms Moorcroft first raised the question of her health in the context of the decision to transfer her, we see a failure to enquire or act on 27/06/19, followed by a failure to act on the medical evidence or change course between her resignation and the meeting of 17/07/19 and again in the letter of Ms Jones of 24/07/19. That negates any possibility that the initial failure to follow up on the report of 27/06/19 was because they were waiting for the Occupational Health report. It is part of the pattern of refusing to concede on the transfer.

5.163. We conclude that having decided on the transfer, finding that Ms Moorcroft was unwilling to submit to it, the course of action then adopted was to insist on it, because of her reluctance, and without proper regard to what she was saying about her mental health, or the later evidence in support of the risks of it deteriorating.

5.164. We do, in the next section, find that there was a failure to make a reasonable adjustment to keep Ms Moorcroft at Boldings.

5.165. We find that this insistence on the transfer, without regard to her health, from 27/06/19 onwards was unfavourable treatment because of her unwillingness to submit to the transfer and that reluctance to submit to the transfer was something arising from her disability. This was a discrimination because of something arising from disability.

5.166. Next, we reach

- “Ms Jones relying on the witness statements on 24/07/19 as a reason for not letting Ms Moorcroft return to Boldings (p) and (q)

5.167. In that these relate to the failure to read the witness statements and Ms Jones reliance on them in error, both plainly unfavourable treatment, these matters seem unelated to Ms Moorcroft’s absence or to her reluctance to move to a different care home. However, in looking at Ms Jones’ reasoning, she was again addressing the reluctance to transfer and that reluctance must have had more than a trivial influence over her actions.

5.168. Refusing to investigate the Grievance on or after 09/08/19, albeit plainly unfavourable, cannot readily be seen as because of or influenced by the absence or the reluctance to transfer.

5.169. In respect of time limits, the claim was brought on 10/11/19. The ACAS dates are 28/08/19 to 12/10/19, and the early conciliation period runs for 44 days. Any claim for which the time limit expires during the early conciliation period is in time if brought

within one month, or within a further 44 days. That means that any act on or after 30 May 2019 will be within time on a claim lodged on 10/11/19.

5.170. The claims based on events from 5/06/19 that we have found to be unfavourable treatment because of something arising from disability are all in time.

5.171. Those are:

> The Respondent sending a letter to the Claimant dated 05/06/2019 that threatened the Claimant with a stage 3 Sickness Absence Hearing if the Claimant did not return to her work duties by Monday 8 July 2019 with a possible outcome being the termination of employment on the grounds of capability.
>
> The Respondent in the same letter sent to the Claimant dated 05/06/2019 concluding the letter with 'we look forward to you returning to work on Monday 8 July 2019' thereby continuing the implied capability threat against the Claimant.
>
> The Respondent in the same letter sent to the Claimant dated 05/06/2019 concluding the letter with 'we look forward to you returning to work on Monday 8 July 2019' thereby continuing the implied capability threat against the Claimant irrespective of her medical condition.

5.172. And,

> The Respondent ignoring a telephone notification by the Claimant on 27/06/2019 that her doctor was concerned about her change of location and this might be detrimental to the Claimant's health.

5.173. And in respect of the period between the resignation and the meeting of 17/07/19 and again in the letter of Ms Jones of 24/07/19,

> The Respondent disregarding a doctor's letter dated 01/07/2019 regarding concerns about the change of location and the same being detrimental to the Claimant's health.
>
> The Respondent disregarding the recommendations and guidance from Occupational Health dated 03/07/2019 and failing to take onboard concerns about the Claimant's change of location and this might be detrimental to the Claimant's health.
>
> "Ms Jones relying on the witness statements on 24/07/19 as a reason for not letting Ms Moorcroft return to Boldings (p) and (q)

5.174. Put more simply, they are the retrospective application of the Capability Procedure with the threat of possibly imminent dismissal on 5/06/19, because of her continued

absence; the refusal to enquire further into the health issue to which Ms Moorcroft alerted the Respondent on 27/06/19 and the failure to address or act on the medical evidence from the GP, supported by the content of the Occupational Health report after the resignation, because of her unwillingness to be transferred; the reliance instead on the witness statements as a reason to insist on the transfer.

5.175. We find that with regard to those things the respondent treated the claimant unfavourably because of something arising from her disability, namely being off work on a prolonged absence and her unwillingness on health grounds to move to a different care home. The claims are made in time. The Respondent has not shown justification.

Failure to make reasonable adjustments (section 20 EA 2010)

5.176. The issue as presented to us, after the withdrawal of the reference to the Sickness Absence Policy, which deals with a consensual transfer, is as follows.

5.177. Did the Respondent apply a provision, criterion or practice on the Claimant despite her disability?

c. The Respondent applied a stage 3 disciplinary procedure on the Claimant where "*the next stage may be a Disciplinary transfer*" by transferring her from Boldings Lodge to The Laurels.

d. The Respondent applied the Claimant's contract term: "*You may, however, be required to work at any other place from where the Organisation may operate from time to time or at any other establishment instructed by the Organisation within reasonable daily travelling distance of your home.*" The Respondent intended to transfer the Claimant from Boldings Lodge to The Laurels.

5.178. They did rely on the disciplinary policy authorising a disciplinary transfer. This is a neutral rule applying generally and correctly identified as the PCP applied.

5.179. It is possible that the contractual term authorising the Respondent to transfer staff was widely used but we have no evidence on that. We therefore do not consider it further.

5.180. The next issue is presented as, "Did any such provision criterion or practice put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? By reason of her disability, the claimant has difficulty in coping with change and that has effects on her health."

5.181. The Respondent removed the reasonable adjustment in place by transferring her. That in itself placed her at a substantial disadvantage. That adjustment had enabled her to cope with her mental and physical health on her return to work and it was not appropriate to remove it without full consideration.

5.182. The disadvantage related to requiring her to work in an unfamiliar setting, away from the setting with which she was familiar, when amongst her difficulties were coping with change and coping with being away from home. She benefited psychologically

from an easy and short, predictable trip to and from work. Associated with her disabilities as a cancer survivor with long-standing depression was a level of anxiety and vulnerability to stress that exacerbated her concerns about working elsewhere. The Respondent has accepted that she was disabled by reason of anxiety. She had concerns too about her ability to cope with the client group, who were fit young adults but with profound learning difficulties and challenging, sometimes physical, behaviour. Her disability made her more vulnerable to anxiety about coping in that setting. Her concern was such that she did not feel able to undertake that work.

5.183. Did the Respondent have a duty to make a reasonable adjustment?

5.184. They knew of her disability as a cancer survivor. They should have known of the earlier adjustment. They may have had actual knowledge but at least the officers now handling her had constructive knowledge of a long history of mental health difficulties including depression and an associated vulnerability to stress and anxiety.

5.185. It is good practice for an employer to conduct a proper assessment. Here, as soon as the question of Ms Moorcroft's health was raised, that should have been done, even if the Respondent had overlooked the earlier adjustments. That was by 27/06/19, when Ms Moorcroft raised it.

5.186. The Respondent failed to follow up her reference to the impact of such a move on her mental health, and her GP's concern, or the occupational health report when they were obtained. Even after the resignation, when there was a meeting on 17/07/19 to discuss it, there was neither reference to the medical evidence pointing to the need to explore reasonable adjustments nor any willingness to consider any other outcome than transfer to The Laurels.

5.187. The Respondent was under a duty to make a reasonable adjustment.

5.188. Was an adjustment in allowing her to work at Boldings reasonable?

5.189. This had been the adjustment in place. It had been agreed before and so on the face of it was reasonable.

5.190. Even when demoting her to a care assistant role, there had been no difficulty seen for her to continue working at Boldings.

5.191. To decide at a late stage that a transfer to work elsewhere was necessary required a good reason.

5.192. No such reason has been put forward. The Respondent's HR Director relied on the witness statements from the second investigation, but those do not refer to Ms Moorcroft. There is nothing in those that made it more difficult for her to work at Boldings with her former colleagues. Ms Jones simply had not read them and disregarded Ms Moorcroft's explanation that they were not relevant to her situation.

5.193. No other reason has been put forward. It has not been suggested that it was not possible to supervise Ms Moorcroft at Boldings, and that would be surprising since it was on a site adjacent to The Orchard. The proposal had been for her period of supervision to be as a supernumerary. In any event, in requiring a period of supervision, the Respondent had failed to address what her supervision and training

need was, because they had failed accurately to establish the extent of her responsibility for the errors made.

5.194. It would have been a reasonable adjustment to allow Ms Moorcroft to work at Boldings. It was an immediately practicable adjustment, it would not have been disruptive and it would have overcome the substantial disadvantage concerned.

5.195. The Respondent failed to make reasonable adjustments.

Harassment- s.26 Equality Act 2010

5.196. The issues in a harassment claim in summary are whether the Respondent subjected the Claimant to unwanted conduct that related to the Claimant's protected characteristic and that created a difficult environment for the Claimant, one that violated her dignity or was intimidating, hostile, degrading, humiliating or offensive.

5.197. The unwanted conduct relied on is as follows:

p. Ms Jones writing in a letter dated 23/05/2019, in direct response to the Claimant's grievance dated 16/05/2019, that matters raised would not be investigated as they were out of time and a second appeal was not permitted;

q. The Respondent's HR Department continuously breaching the Sickness and Absence policy when corresponding with the Claimant by misdescribing the purpose of the meetings and not offering to have any representation to attend or alternatively not correctly describing what representative could attend;

r. The Respondent sending a letter to the Claimant dated 5/06/19 that threatened the Claimant with a stage 3 Sickness Absence Hearing if the Claimant did not return to work on 08/07/2019 with a possible outcome being termination of employment on the grounds of capability;

s. The Respondent in the same letter sent to the Claimant dated 5/06/19 concluding the letter with '*we look forward to you returning to work on Monday 8 July 2019*' thereby reinforcing the stated capability and dismissal threat against the Claimant.

t. In a meeting on 26/06/19, the Respondent telling the Claimant that she would be moved to a more distant and unfamiliar care home thereby breaking the established reasonable adjustments put in place in January 2018 in response to the Claimants disability;

u. In a meeting on 26/06/19, the Respondent removing a reasonable adjustment previously made for the Claimant in relation to her working at Boldings Lodge a home that she had happily worked at for 10 years;

v. The Respondent on 27/06/19 ignoring a telephone request made by the Claimant to consider staying at Boldings Lodge or as an alternative, move to Kingsmead Lodge;

w. The Respondent relocating the Claimant to a more distant and unfamiliar care home despite concerns being raised by the Claimant about how this would affect her wellbeing;

x. The Respondent continuing to relocate the Claimant to a more distant and unfamiliar care home counter to the advice given by the Claimant's Doctor that this could be detrimental to the Claimant's health;

y. The Respondent continuing to relocate the Claimant to a more distant and unfamiliar care home counter to the advice given by the Occupational Health Report that this could be detrimental to the Claimant's health;

z. Ms Jones acknowledging in a letter dated 24/07/2019 that the Claimant was being moved to a new location because of 6 witness statements that did not relate to the Claimant;

aa. Ms Jones advising in a letter dated 24/07/2019 that the Claimant was being sent to a new location because *"In our view it would be remiss of SHC to place you back at Boldings because of this* [6 witness statements] *and the difficulties that it may create for you and other staff.*

bb. By Ms Jones proposing in a letter received on 09/08/2019 that she would be prepared to hold a grievance and investigation in response to the Claimant's letter of 29/07/2019 but would exclude the issues raised previously;

cc. By Ms Jones stating in a letter received on 09/08/2019 that she accepts the Claimants resignation thereby invalidating the grievance investigation offer made in the same letter;

dd. Dismissing the Claimant.

5.198. This list can sensibly be summarised as follows, based on our findings:

- The refusal by Mrs Jones on 23/05/19 to investigate the Grievance of 16/05/19;

- The retrospective application on 05/06/19 of stages to the sickness management meeting of 30/05/19 introducing the risk of possibly imminent dismissal;
- The decision to transfer Ms Moorcroft to The Laurels on a disciplinary basis on 26/06/19 and that that removed a previous reasonable adjustment;
- The refusal to reconsider in the light of the Claimant's anxiety and the support from her GP and also from the Occupational Health report, including at the meeting of 17/07/19;
- The error in relying on unrelated witness statements on 24/07/19 and 09/08/19;
- The further refusal to address the Grievance on 09/08/19;

5.199. The last item relied on is the dismissal of the Claimant. That requires unpacking. The dismissal was a constructive dismissal founded on a series of actions we have found to amount to breaches of the implied contract term of trust and confidence. Those actions are fairly covered in the list above.

5.200. The question is whether that conduct related to the Claimant's protected characteristic, namely disability? In the discussion that follows, we rely on the analysis already carried out. The context for the Respondent's actions towards the Claimant have been explored. There was a disciplinary procedure in which they had confidence and saw her unwillingness to submit to the penalty as unfounded. They had not been aware, as they should have been, of the extent of her disability and of the earlier adjustments made.

5.201. Working through the summary, we find as follows in relation to whether these represent unwanted conduct related to Ms Moorcroft's disability.

5.202. The refusal on 23/05/19 to investigate the Grievance of 16/05/19: this was unwanted, but it was not related to Ms Moorcroft's disability.

5.203. The retrospective application of stages to the sickness management meeting of 30/05/19 introducing the risk of possibly imminent dismissal: the Respondent had constructive knowledge of mental health impairments as a disability, and direct knowledge of Ms Moorcroft's poor mental health given her absence, on a diagnosis of work-related stress. They were responding to her absence here in tightening their approach, and this action is unwanted and related to her disability.

5.204. The decision to transfer Ms Moorcroft to The Laurels on a disciplinary basis on 26/06/19 and that that removed a previous reasonable adjustment: there had been a failure to record adjustments made and the reasons for them. That caused the failure to take into account the reasonable adjustments and the decision to transfer Ms Moorcroft had the effect of removing them. The removal of reasonable adjustments is unwanted and an act that is related to Ms Moorcroft's disability.

5.205. The refusal to reconsider in the light of the Claimant's anxiety and the support from her GP and also from the Occupational Health report, including at the meeting of 17/07/19: the reasonable adjustments made had been for Ms Moorcroft to work at Boldings. She was displaying anxiety at that arrangement being changed. The Respondent had actual knowledge of her disability of cancer, with attendant

psychological impacts which were acknowledged in granting the original reasonable adjustments, and constructive knowledge of a long-standing history of depression and anxiety. They had actual knowledge of a recent history of absences due to work-related stress. In the telephone call of 27/06/19, they knew of her discussion of her condition with her GP and she relayed her doctor's concern. This too is unwanted and related to her disability.

5.206. The error in relying on unrelated witness statements on 24/07/19 and 09/08/19. This is only tangentially related to her disability and addressed in relation to discrimination arising from disability instead.

5.207. The further refusal to address the Grievance on 09/08/19: this is unrelated to her disability.

5.208. The next question is whether the unwanted conduct that is related to the Claimant's disability had the required purpose or effect of:

a. Violating the Claimant's dignity; or

b. Creating an intimidating, hostile, degrading, humiliating or offensive environment or the Claimant?

5.209. And, If it had that effect, then, having regard to all the circumstances of the case and the perception of the Claimant, was it reasonable for the conduct to have that effect on the Claimant?

5.210. The conduct we have found to be related to Ms Moorcroft's disability is:

- The retrospective application of stages to the sickness management meeting of 30/05/19 introducing the risk of possibly imminent dismissal
- The decision to transfer Ms Moorcroft to The Laurels on a disciplinary basis on 26/06/19 and that that removed a previous reasonable adjustment
- The refusal to reconsider in the light of the Claimant's anxiety and the support from her GP and also from the Occupational Health report, including at the meeting of 17/07/19.

5.211. Ms Moorcroft was alarmed by the introduction of Stages to the procedure she was engaged in and in particular by the reference to Stage 3 and the warning that dismissal might be imminent. She found that distressing and intimidating and it is the reason why she resigned when she did, just before the deadline she saw imposed. It was unfair, having changed the procedure retrospectively and without the proper processes. It meant she was much further along the Capability Procedure than she could have appreciated and had not had the warnings or the opportunities to obtain advice and be accompanied at meetings that she should have.

5.212. The removal of the reasonable adjustments was in particular a source of distress, since it withdrew the recognition of the difficulties she had faced, and the support she had secured in the light of it. That was humiliating.

5.213. The failure to attach weight to her explanation that there were concerns about her mental health was degrading and humiliating to her, the more so because of her known history, and her understanding that the Respondent's officers had the fuller history.

5.214. It was reasonable for that conduct to have that effect.

5.215. These were actions that meet the definition of harassment.

Direct Disability Discrimination- s.13 Equality Act 2010

5.216. In respect of the claim for direct disability discrimination the Claimant relies on the following acts or continuing series of Acts (some dates have been added and the order revised to chronological):

a. The manner in which the investigation meeting on 24/08/2018 was conducted; (a)

b. The Respondent breaching staff confidentiality and data protection in respect to six witness statements that had been sent to the Claimant which were related to another individual's disciplinary (18/02/19) (p);

c. The Respondent inviting the Claimant, by letter dated 04/04/2019, to a 'sickness Absence Review Meeting' on 09/04/2019 (b);

d. The Respondent inviting the Claimant by letter dated 14/05/2019 to a further '*informal wellbeing meeting to discuss the current state of your diagnosed medical condition*' on 24/05/2019 (c);

e. The Respondent's HR Director (Ms Olive Jones) writing in a letter dated 23/05/2019, in direct response to the Claimant's grievance dated 16/05/2019, that matters raised would not be investigated as they were out of time and a second appeal was not permitted (d);

f. The Respondent asking the Claimant in a letter dated 23/05/2019 to attend a rescheduled wellness meeting on 30/05/2019 (e);

g. The Respondent sending a letter to the Claimant dated 05/06/2019 that threatened the Claimant with a stage 3 Sickness Absence Hearing if the Claimant did not return to her work duties by Monday 08/07/2019 with a possible outcome being the termination of employment on the grounds of capability (f);

h. The Respondent in the same letter sent to the Claimant dated 05/06/2019 concluding the letter with '*we look forward to you returning to work on Monday 8 July 2019*' thereby continuing the implied

capability threat against the Claimant irrespective of her medical condition (g)

i. The Respondent removing a reasonable adjustment previously made for the Claimant's disability in a meeting on 26/06/2019, by relocating the Claimant to a different and more distant care home (h);

j. By the Respondent moving the Claimant to an unfamiliar care home thereby breaking the contractually established reasonable adjustments put in place in January 2018 for the Claimants disability (s);

k. In a meeting on 26/06/2019, the Respondent removing a reasonable adjustment previously made for the Claimant's disability in relation to her working 24 hours per week over two 12-hour night shifts (i);

l. The Respondent ignoring a telephone notification by the Claimant on 27/06/2019 that her doctor was concerned about her change of location and this might be detrimental to the Claimant's health (j);

m. The Respondent ignoring a telephone request by the Claimant on 27/06/2019 that she wanted to remain at Boldings Lodge as she had happily worked there for 10 years (k);

n. The Respondent on 27/06/2019 ignoring a telephone request made by the Claimant to consider an alternative move to Kingsmead Lodge as she car shares with her daughter and it is closer to home (l);

o. The Respondent disregarding a doctor's letter dated 01/07/2019 regarding concerns about the change of location and the same being detrimental to the Claimant's health (m);

p. The Respondent disregarding the recommendations and guidance from occupational health dated 03/07/2019 and failing to take onboard concerns about the Claimant's change of location and this might be detrimental to the Claimant's health (n);

q. Dismissing the Claimant (t). She resigned on 7/07/19 with effect from 8/07/19.

r. Ms Jones acknowledging in a letter dated 24/07/2019 that one of the reasons the Claimant was being moved was because of the 6 witness statements (that did not relate to the Claimant) (q);

s. Ms Jones advising in a letter dated 24/07/2019 that the Claimant was being moved location because *"In our view it would be remiss of SHC*

to place you back at Boldings because of this [6 witness statements] *and the difficulties that it may create for you and other staff* (r)*;*

t. The Respondent refusing to reconsider its position on relocating the Claimant and leaving her at Boldings Lodge as a reasonable adjustment requested by the Claimant. (1/08/19).

5.217. The question is whether the alleged conduct of the Respondent amounted to less favourable treatment of the Claimant because of disability than the comparator.

5.218. The comparator we need to consider is someone with Ms Moorcroft's abilities and skills, who does not have her impairment.

5.219. The requirement of section 13 is that the less favourable treatment is *because of* the disability.

5.220. We can identify a number of reasons for the treatment Ms Moorcroft experienced. For the most part, we do not identify that the reasons were her cancer or her status as a survivor of cancer or her mental health of which the Respondent's HR team had constructive knowledge.

5.221. Something has to prompt the conclusion that the one was because of the other – it cannot simply be said that because Ms Moorcroft was badly treated and was disabled under the Act that the treatment was *because* of her disability.

5.222. So, while Ms Moorcroft has complained about the way in which the meeting on 24/08/18 was conducted, for example, we have no basis on which to infer that the investigating officer handled it in the way she did *because of* the disability.

5.223. The HR Director in 2019 refused to investigate her Grievance, but that was because it was a challenge to a disciplinary process that had been concluded and she saw the challenge as unreasonable. There is no reason to infer that the fact that Ms Moorcroft had had cancer, or that Ms Jones should have known that she had long-standing mental health difficulties played any part in that decision; was causal. The proposal to move her to The Laurels was not *because of* her disability, but because the Respondent decided that to be an appropriate alternative penalty, while oblivious to the effects of the disability, her mental health or the previously agreed adjustments. "Oblivious to" does not equate to "caused by".

5.224. The same analysis applies throughout – so, for example, the Respondent did not disregard the doctor's letter of 01/07/19 *because of* Ms Moorcroft's disability.

5.225. Even though there is a long history of unfavourable treatment of Ms Moorcroft, in particular in the flawed disciplinary proceedings and the decision to move her to The Laurels, nothing points to that being *because of* her disabilities.

5.226. The exceptions are the invitations to the wellness or sickness absence review meetings; those at least have some obvious connection to Ms Moorcroft's health.

But they were a response to her absence, which might be considered "something arising" from her health rather than *because of* her disability.

5.227. No matter how we approach the question of direct disability discrimination, we do not find that it affords an explanation for the treatment complained of.

5.228. The issue in relation to direct discrimination is whether the treatment complained of was because the claimant was disabled. The comparison must be with someone with her skills and abilities but not disabled. We simply cannot identify on what basis this sequence of events, and they have been considered individually and together, can be said to be because of the known disability of cancer or the other disabilities conceded by the respondent of anxiety, stress and depression.

5.229. There was no contravention of Section 13 Equality Act 2010?

Victimisation- s.27 Equality Act 2010

5.230. A similar issue arises in a victimisation claim. The essence of a victimisation claim is that the claimant has done something to invoke the protection of the Equality Act, and has been badly treated *because of it.*

5.231. The wording is, "Did the Respondent subject the Claimant to a detriment *because* the Claimant had done a protected act."

5.232. We have a similarly long list of suggested detriments. It is not clear from the evidence that any are because of the protected acts relied on nor is the point addressed in submissions. It is the causal connection that is missing.

5.233. The reasons for the Respondent's actions towards the Claimant have been canvassed above. There was a disciplinary procedure in which they had confidence and saw her unwillingness to submit to the penalty as unfounded. They had not been aware, as they should have been, of the extent of her disability and of the earlier adjustments made.

5.234. Those explain the way the Claimant was treated.

5.235. The decision to move the Claimant to The Laurels, for example, was unrelated to the protected acts. It was prompted by the successful appeal of the other nurse, and based on a misunderstanding of the investigation. It was not because of a protected act.

5.236. Ms Jones did not fail to understand the effect of the witness statements because of a protected act. Nor did she write to the Claimant to explain that they were why Ms Moorcroft could not go back to work at Boldings because of a protected act. She misunderstood the witness statements because she did not read them. She decided Ms Moorcroft should not go back to Boldings because she assumed Ms Moorcroft was implicated in the wider and more serious medication errors that happened after her shift ended on the morning of 19/12/18.

5.237. The Respondent did not circulate those witness statements to Ms Moorcroft because of a protected act. They were circulated because they were part of the "Nurses @ Boldings" investigation report.

5.238. Leaving aside for the moment that anything found to be harassment cannot also be victimisation, we have not found any instance where the protected acts relied on were the reason for the treatment pleaded.

5.239. We do not find victimisation.

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Indirect Discrimination- s.19 Equality Act 2010

5.240. In relation to indirect discrimination, we are considering whether a neutral rule disadvantages the claimant and others with similar characteristics in a way that it does not disadvantage a wider group. It is not a particularly easy or well-understood concept. People may well understand readily what an unfair dismissal is without knowing about section 98 of the Employment Rights Act. It is much harder to appreciate the way that section 19 of the Equality Act works.

5.241. We accept that the Respondent applied the disciplinary procedure in deciding on a disciplinary transfer.

5.242. We accept the rule relating to disciplinary transfer applied generally to those employed by the Respondent, or employed as nurses. Different PCPs applied to bank or agency staff.

5.243. We haven't accepted the rule in the contract authorising transfer both because that is not the provision the Respondent applied and because we do not know whether other contracts had the same rule.

5.244. In discussing the issues at the outset, the definition of the disadvantage proposed was changed to,

p. Having difficulty in coping with change and in particular transfer from a familiar place of work.

5.245. Where we are in difficulties is that the persons with whom the Claimant shares the protected characteristic have not been identified, or the particular characteristic at play. Nor has the question of indirect discrimination been canvassed in evidence, either oral or documentary, or, effectively, in submissions.

5.246. The Respondent had not had meaningful notice of the case being brought; nor did the evidence address it.

5.247. While a history of depression and anxiety and difficulty in coping with change may be readily associated in layman's terms, we are not willing to rely on our sense that that may be the case to identify the group for ourselves and make the comparison required without supporting evidence or the opportunity for comment by the Respondent.

5.248. The same issues have been dealt with in relation to reasonable adjustments. There is no injustice to the Claimant in dismissing this claim.

5.249. We dismiss the claim of indirect disability discrimination.

Employment Judge Street

Date 16 June 2021